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Supreme Court, U.S.
FILED

NO. 93-2067

JUN 22 1994
OFFICE OF THE CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1994

DEWAN WHITE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

RASHAUN B. LAWRENCE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Illinois Supreme Court err in refusing to apply the strict scrutiny test in determining whether the public housing provision of the Illinois Juvenile Transfer Act denies African-American children equal protection under the Fourteenth Amendment to the United States Constitution?

2. Did the Illinois Supreme Court err in holding, as a matter of law, that Petitioners' valid statistical evidence — that 100% of the juveniles affected by operation of the Act at issue are African-American — did not "ripen into proof" of discriminatory intent?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Rashaun Lawrence and Dewan White respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this cause.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Appendix "App." A, *infra*) is reported at 1994 WL 93484 (Ill. March 24, 1994). The order of the trial court (App. B, *infra*) is unreported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on March 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. XIV

705 405/1-2(3)(b)

705 405/5-4(1)

705 405/5-4(7)(a)

The constitutional and statutory provisions involved are reprinted at Appendix C, *infra*.

STATEMENT OF THE CASE

Petitioner Rashaun Lawrence ("Rashaun") is an African American who was 16-years old when he was arrested and charged with possession and attempt to deliver a controlled substance one door away from where he lives in the Ida B. Wells housing project operated by the Chicago Housing Authority ("CHA"). (1 Lawrence CLR, p. 7.) Similarly, Petitioner Dewan White ("Dewan") is an African American who was 16-years old when he was charged with delivery of a controlled substance a few doors away from where he lives in a CHA project. (1 White CLR, p. 5.) Neither child was afforded the protections of Illinois' Juvenile Court Act.[1] Instead, both Rashaun

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1 Children, those individuals under the age of 17, typically are afforded certain protections when they are accused of a criminal offense. Illinois has codified these protections in the Juvenile Court Act of 1987. 705 ILCS 405/1, *et seq.* The Juvenile Court Act guarantees Illinois children "a right to services necessary to [their] proper development" and shelters children from criminal prosecution until they reach 17 years of age. 705 ILCS 405/1-2(3)(b); 705 ILCS 405/5-4(1) (1992). When a child is charged with a criminal offense, an "adjudicatory hearing" is held which, unlike a criminal prosecution, must be conducted "in a spirit of humane concern" to promote the child's "moral, emotional, mental and physical welfare." 705 ILCS 405/1-2 (1992).

and Dewan were subject to the public housing provision of the Juvenile Transfer Act (hereinafter "Act"), 705 ILCS 405/5-4(7)(a), which denies Juvenile Court Act protections to 15- and 16-year olds charged with selling a controlled substance on or within 1,000 feet of public housing property. Children subject to the public housing provision automatically are transferred to the adult criminal court system — a system that focuses on punishment rather than guidance and rehabilitation. As a result of their transfer, Rashaun was charged with a non-probational Class X felony and Dewan was charged with a non-probational Class I felony. If the Act is upheld and these boys are convicted, Rashaun will be sent to adult prison for a mandatory term of 6 to 30 years. Dewan will be sent to adult prison for a mandatory term of 4 to 15 years. Along with Rashaun and Dewan (collectively "Petitioners"), 32 other children have been impacted adversely by the public housing provision of the Act from August 1991 through July 1992. All 34 children are African-American. (2 Lawrence CLR, p. G-6.) If they had been charged with the same controlled substance offenses in all-white neighborhoods, more than 1,000 feet from the public housing projects where they live, they would have been treated as juveniles subject to the protections and punishments of the Juvenile Court Act.

Petitioners moved to dismiss the charges against them on the basis that the public housing provision of the Act violated the Equal Protection Clause of the United States Constitution and the Illinois Constitution, and the trial court granted their motions to dismiss. (App. B at B-5-B-6; 1 Lawrence CLR, p. 47; 1 White CLR, p. 38.) The trial court found that all children subject to the Act are African Americans, that less than 2% of CHA residents are white, and that over 90% of CHA residents are African Americans. (App. B at B-3-B-4; 1 Lawrence CLR, p. 49; 1 White CLR, p. 36.)

The trial court considered the legislature's statements during the debates of the Illinois House and Senate which anticipated the discriminatory impact of the Act. For example, Representative Davis stated his concerns during the Illinois General Assembly's debate as follows:

> You're saying here . . . because this juvenile lives in or commits this crime in a public housing area, that he

> should be tried as an adult, but if he commits this crime . . . let's say in Bridgeport, he is not sentenced as an adult . . . I mean if you do it in Bridgeport, it's not as bad . . . what you're saying, they deserve . . . the criminals in public housing deserve a greater sentence than those from Bridgeport? . . . or the North Side of Chicago? . . . [A]re we going to legislate a different Criminal Code or a Penal Code for those who live in the public housing environment? That will be different than people that come from Elmhurst or the people that come from the Northside of Chicago. Crime is crime, Representative. . . . We cannot in this Body, decide that if you live in public housing and you commit a crime, that your sentence will be greater than those who don't live in public housing and commit a crime. You just can't do that. The judges will tell you, Sir, it's unconstitutional and discriminatory.

(1 White CLR, p. 63-64.)[2] Representative Williams remarked that "[t]he fact that we're going to be specializing in singling out a certain category of individuals . . . is just a shame. We shouldn't create special categories of crime for special citizens." (1 White CLR, p. 66.) Representative Morrow followed, stating:

> [I]f [a] young man happened to live in the projects, and not in Oak Lawn, he's going to receive double or triple the sentence that he did receive for the crimes that he did commit. Why should we single out someone who might be doing drug dealing, or some crime activity in a project . . . . Think about what you're doing here. Crime is crime, whether it's in Oak Brook, Oak Lawn, Robert Taylor Home, anywhere, crime is crime, and it should be treated as such.

(1 White CLR, p. 67.)

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2 "Bridgeport," "Elmhurst," and "the Northside of Chicago" are white neighborhoods.

Based on the legislative history of the Act and the fact that 100% of the children affected by the operation of the Act are African Americans, the trial court found that the Act created a *de facto* racial classification and that a discriminatory intent could be inferred from the totality of the circumstances. Applying the strict scrutiny standard, the trial court found that the public housing provision of the Act violated the Equal Protection Clause of the United States Constitution as well as the Illinois Constitution. (App. B at B-5.)

The Illinois Supreme Court, however, reversed the trial court's decision stating that "the trial court erred by ruling that the provision created a *de facto* suspect classification." (App. A at A-8.) According to the Illinois Supreme Court, application of the rational basis test was proper and the Act passed muster under that test. (App. A at A-8.)

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve unsettled questions of federal constitutional law in the context of increasingly popular state and federal enhanced penalty statutes that have an undeniable gross disparate impact on racial minorities. Unsettled is the fundamental question of whether lower courts should apply the strict scrutiny, or rational basis test, or some intermediate test when an enhanced penalty statute inevitably affects predominantly or exclusively a particular racial class. Contrast the decision of the Illinois Supreme Court below with the decision of the Minnesota Supreme Court in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (state statute that punished possession of "crack" cocaine more severely than possession of powdered cocaine held unconstitutional when statistics showed that over 95% of those arrested for possession of "crack" were African-American while almost 80% of those arrested for possession of powered cocaine were white), and with the decision of the United States district court in *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) (disproportionate penalties for "crack" cocaine in the Federal Sentencing Guidelines violate the Equal Protection Clause of the United States Constitution). If neither the strict scrutiny nor rational basis test is appropriate in these types of cases, then this Court should grant the writ and establish an alternate heightened scrutiny test for use in these types of cases.

This Court also should grant the writ to resolve unsettled questions of federal law regarding whether the lower courts can rely on statistical evidence of disparate impact on racial minorities in enhanced penalty cases to infer discriminatory intent. This Court should craft a test, faithful to the purpose of the Equal Protection Clause, that permits lower courts to rely on compelling statistical evidence to infer discriminatory intent. Any other test, such as that employed by the Illinois Supreme Court below, denies equal protection in all cases in which the adversely affected racial class cannot produce the unproduceable smoking gun.

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE UNSETTLED QUESTIONS OF FEDERAL LAW REGARDING THE PROPER LEVEL OF CONSTITUTIONAL SCRUTINY TO APPLY WHEN ENHANCED PENALTY STATUTES INEVITABLY AND UNDENIABLY HAVE A GROSS DISPARATE IMPACT ON RACIAL MINORITIES

Increasingly in vogue with state and federal legislators are enhanced penalties for certain types of criminal offenses.[3] Florida,

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3 Among the states with enhanced penalty statutes are Alabama, ALA CODE §§ 13A-12-250 & 13A-12-270 (1993); Arizona, ARIZ. REV. STAT. ANN. § 13-3411 (1994); Delaware, DEL. CODE ANN. tit. 16, § 4767 (1993); Hawaii, HAW. REV. STAT. § 712-1249.6 (1993); Indiana, IND. CODE ANN. § 35-48-4-7 (West 1994); Iowa, IOWA CODE ANN. § 124.401A (West 1994); Kansas, KAN. STAT. ANN. § 65-4127a (1993); Louisiana, LA. REV. STAT. ANN. § 40:981.3 (West 1994); Massachusetts, MASS. GEN. LAWS ANN. ch. 94c, § 32J (West 1994); Mississippi, MISS. CODE ANN. § 41-29-142 (1993); Missouri, MO. ANN. STAT. § 195.214 (Vernon 1993); Montana, MONT. CODE ANN. § 45-9-109 (1993); New Jersey, N.J. STAT. ANN. § 2C:35-7 (West 1994); New Mexico, N.M. STAT. ANN. § 30-31-20 (Michie 1993); New York, N.Y. PENAL LAW § 220.44 (McKinney 1994); Ohio, OHIO REV. CODE ANN. § 2925.02 (Anderson 1993); Oregon, OR. REV. STAT. § 475.999 (1993); Vermont, VT. STAT. ANN. tit. 18, § 4237 (1993); Wisconsin, WIS. STAT. ANN. § 161.49 (West 1994); Wyoming, WYO. STAT. § 35-7-1036 (1993); as well as Puerto Rico, P.R. LAWS ANN. tit. 24, § 2411a (1992); and the Virgin Islands, V.I. CODE ANN. tit. 19, § 604 (1993).

Alabama, Minnesota and Missouri, as well as Illinois, have adopted enhanced penalties for narcotics offenses committed near public housing projects. *See* ALA. CODE § 13A-12-270 (1993); FLA. STAT. ANN. § 893.13(1)(i)1 (West Supp. 1990); MINN. STAT. § 152.029 (1993); MO. ANN. STAT. § 195.218 (Vernon, 1994). In addition, the Federal Sentencing Guidelines and twenty-six states provide enhanced penalties for defendants convicted of selling certain controlled substances near public schools or playgrounds. *See* 21 U.S.C. § 860 (Supp. 1993); ALASKA STAT. § 11.71.030 (Supp. 1993); IND. CODE ANN. § 35-48-4-1 (Burns 1993); KY. REV. STAT. ANN. § 218A. 1411 (Michie/Bobbs-Merrill 1993). Some of these statutes, such as that adopted in Illinois, combine enhanced penalties with the transfer of juveniles to adult courts.[4] Likewise, the Federal Sentencing Guidelines and several states provide enhanced penalties for defendants convicted of selling "crack" cocaine rather than powder cocaine. *See* 21 U.S.C. § 841(b)(1)(A)(ii) (Supp. 1993); S.C. CODE ANN. § 16-1-100 (Law. Co-op 1993).

The reason for the proliferation of these types of statutes is clear. When citizens read in the daily newspapers and watch the nightly crime shows about drive-by shootings, gang warfare, brutal murders of children and elderly persons, they demand action. Legislators, feeling the pressure, respond by filling legislative hoppers with new crime bills, each one more draconian than before. The popular perception is that the public is willing to pay any price to control crime — even if it means abandoning traditional constitutional safeguards.

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4 Strong public policy arguments have been raised against the juvenile transfer statutes with enhanced penalties for certain criminal offenses. Automatic transfer statutes transfer children solely on the basis of age and offense while ignoring their background and rehabilitative ability. These statutes basically strip the Juvenile Court judge of any discretion to rehabilitate a young first-time offender. Moreover, studies show that recidivism rates are higher for those children transferred to the adult court system compared to those children who remain in the juvenile court system. *See* Fagan, Jeffrey, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, National Institute of Justice, U.S. Dep't of Justice, 1991.

Historically, the abandonment of traditional constitutional safeguards in an effort to combat crime has impinged most severely on African Americans. The empirical evidence of this historical phenomenon is explained in detail in *United States v. Clary*, 846 F. Supp. 768, 774-82 (E.D. Mo. 1994), which we adopt by reference. Suffice it to add here that, although overt legislative racism is mostly a thing of the past, the disparate impact of new crime legislation on African Americans continues today—albeit in more subtle and discrete forms as evidenced by the public housing provision of the Illinois Juvenile Transfer Act.

The disparate impact on African Americans caused by enhanced penalties for certain types of criminal behavior has not gone unnoticed by the lower courts. Although the concern about the disparate impact is nearly uniform, the judicial treatment has been anything but uniform. The Illinois Supreme Court's treatment below is but one example. Despite the uncontroverted fact that 100% of the persons affected by the public housing provision of the Illinois Juvenile Transfer Act have been African-American children, the Illinois Supreme Court held that the rational basis test provided the appropriate mode of analysis and that the Act should be upheld because the court could think of some arguably rational purpose for the Act. (App. A at A-8.)

In contrast, the Minnesota Supreme Court, presented with evidence of a similar *de facto* racial classification, held unconstitutional a Minnesota statute that created enhanced penalties for possession of "crack" cocaine. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Evidence before the Minnesota Supreme Court showed that 95% of those arrested for possession of "crack" were African-American while almost 80% of those arrested for possession of powdered cocaine were white. In part because of unresolved questions of federal law, and for other obvious reasons, the Minnesota Supreme Court relied on the "Minnesota rational basis test" which involves a heightened level of scrutiny. *Id.* at 888.

The concern, confusion and disagreement in enhanced penalty cases is present at the federal court level as well. In *United States v. Clary, supra,* the district court after an extensive analysis of this Court's equal protection decisions applied the strict scrutiny test to

hold unconstitutional federal sentencing guidelines that enhanced penalties for possession of "crack" cocaine. 846 F. Supp. at 791. The district court relied on undeniable evidence of disparate impact on African Americans and a legislative debate that recognized the inevitability of the disparate impact that eventually occurred in the actual operation of the guidelines. *Id.* at 782-86. Other federal judges have concurred with this analysis. *See United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (concerned about the sufficiency of the record supporting the view that Congress had a sound basis to make a harsh distinction between powder cocaine and crack cocaine, particularly in light of the evidence of racial disparity in drug enforcement); *see also United States v. Majied*, 1993 WL 315987 at *4, 5 (D. Neb. July 29, 1993) (downward departure from Sentencing Guideline due to racially disparate impact on African Americans), *rev'd sub. nom. United States v. Maxwell*, __ F.3d __, 1994 WL 202727 (8th Cir. May 26, 1994).

To be sure, the various courts that have applied equal protection analysis to enhanced penalty statutes have cited, in talismanic fashion, this Court's decisions in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 276 (1979) (the "dispositive question, then is whether . . . [a] discriminatory purpose has, at least in some measure, shaped the [legislation]."); *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("[t]he necessary discriminating racial purpose [need not] be express or appear on the face of the statute."); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("Determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' "); and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977) (the legislative history "may be highly relevant, especially where there are contemporary statements by members of the decision-making body."). Equally true is that these decisions contain something for both sides of the debate regarding whether to apply the strict scrutiny, rational purpose, or "something-in-between" tests.

The Illinois Supreme Court below clearly erred in rejecting the strict scrutiny test in favor of the rational basis test despite the undeniable fact that the public housing provision of the Illinois

Juvenile Transfer Act, in operation, has affected exclusively African-American youth. Although facially neutral, the Act has created just what many Illinois legislators knew would happen before the Act was passed — namely a *de facto* racial classification. Everyone knew then, and knows today, that African-American children, to the extent that they are going to possess or sell controlled substances, are going to do so near where they live — and not in the predominantly white neighborhoods where they do not live. Everyone knew then, and knows today, that CHA residents are overwhelmingly African-American as a result of purposeful segregation practices (*see Hills v. Gautreaux*, 425 U.S. 284 (1976)). It was self-evident that the Juvenile Transfer Act would have a disparate affect on CHA children. Everyone knew then, and knows today, that white children possessing and selling the same drugs in their white neighborhoods would not be impacted by the Act, would not be transferred into adult court, and would not be sent to adult prison at ages 15 and 16 for lengthy minimum terms of incarceration. To apply the rational basis test in these kinds of cases makes the Fourteenth Amendment guarantee of equal protection to African-American children wholly illusory.

The Illinois Supreme Court's decision below should be reversed. Moreover, this Court should grant the writ to resolve unsettled questions of federal law regarding whether to apply the strict scrutiny test in enhanced penalty cases involving racially disparate impact.

II. THIS COURT ALSO SHOULD GRANT THE WRIT TO RESOLVE UNSETTLED QUESTIONS OF FEDERAL LAW REGARDING THE EXTENT TO WHICH COURTS CAN RELY ON STATISTICAL EVIDENCE OF DISPARATE IMPACT ON RACIAL MINORITIES IN ENHANCED PENALTY CASES AS PROOF OF DISCRIMINATORY INTENT

Although acknowledging that 100% of the juveniles affected by the public housing provision of the Illinois Juvenile Transfer Act have been African-American and that the members of the Illinois legislature had accurately predicted the Act's disparate impact, the Illinois Supreme Court below, relying on *Price v. Austin Independent*

School District, 945 F.2d 1307, 1319 (5th Cir. 1991), concluded "that if any inference of racial discrimination existed, it failed to ripen into proof." (App. A at A-8.) Without identifying what type of smoking gun evidence would suffice as proof of discriminatory intent, the Illinois Supreme Court made clear that it would draw no inference of discriminatory intent from statistics demonstrating that the statute exclusively affected African-American youth. The Illinois Supreme Court's refusal to rely on statistical evidence of disparate impact as proof of discriminatory intent is inconsistent with the approach adopted by this Court and the majority of other courts in other types of equal protection cases arising under the Fourteenth Amendment (*see, e.g., Hunter v. Underwood*, 471 U.S. 222 (1985)), but it is by no means totally unusual. *See, e.g., American Nurses Ass'n v. State of Ill.*, 783 F.2d 716, 722 (7th Cir. 1986). Little or no guidance regarding the proper approach exists in the context of enhanced penalty cases arising under the Fourteenth Amendment.

In other contexts, this Court has made clear that statistical evidence of disparate impact is relevant, and at times may alone prove discriminatory intent. For example, in the context of religious discrimination, this Court recently held unconstitutional ordinances prohibiting ritualistic animal sacrifices not for the primary purpose of food consumption. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 2228 (1993). This Court stated:

> It becomes evident that these ordinances target Santeria [a religious group] sacrifice when the ordinances' operation is considered. Apart from the text, the effect of the law in its real operation is strong evidence of its object.

See also McCleskey v. Kemp, 481 U.S. 279, 293 (1987) ("[s]tatistical proof normally must present a "stark" pattern to be accepted as the sole proof of discriminatory intent under the Constitution"); *Hunter v. Underwood*, 471 U.S. 222 (1985) (relevant statistical proof showed that the state definition of crimes involving "moral turpitude" disenfranchised a significantly greater percentage of African-American voters than white voters); *Batson v. Kentucky*, 476 U.S. 79 (1986)

(statistical evidence that a disproportionate number of African-American s were excused from jury service proved an Equal Protection Clause violation); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) ("[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination"); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312 (1965) ("Thus where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (statistical evidence showed equal protection violation arising out of a racially neutral boundary reconfiguration that excluded approximately 400 black voters while retaining every white voter); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (statistics showed facially neutral law requiring a permit for laundries in a wooden building had the unconstitutional effect of closing 200 Chinese laundries while granting permits to all but one of 80 white applicants).

Without the ability to prove discriminatory intent with statistical evidence of disparate impact in enhanced penalty cases, a litigant seeking equal protection under the Fourteenth Amendment effectively is locked out of court. As Justice Stevens recognized in *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring), "[i]t is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker . . . ." Moreover, as this Court recognized in *Hunter v. Underwood*, *supra*, the difficulty of proving the intent of a large legislature is considerable. 471 U.S. at 228 ("When we move from an examination of a board of county commissioners . . . to a body the size of the Alabama Constitutional Convention of 1901, the difficulties in determining the actual motivations . . . increase."); *see also* Etienne Balibar, "Class Racism" in *Race, Nation, Class* 204, 319 (1991) ("Improper motives are easy to hide. . . . Moreover, where several decision makers are involved, proof of racially discriminatory motivation is even more difficult.").

In short, in a case like this one where the state's highest court does not question the reliability or validity of statistical evidence, and does not question the foreseeability of the disparate impact, but

nevertheless concludes that any inference of racial discrimination "failed to ripen into proof," the Fourteenth Amendment's protection against racial discrimination is entirely without substance and meaning. The Illinois Supreme Court's insistence on more "proof" without explaining what type of "proof" would be constitutionally acceptable, effectively deprived Petitioners of their constitutional right to equal protection.

The Illinois Supreme Court's decision below should be reversed. Moreover, this Court should grant the writ to provide the lower courts with guidance regarding the extent that they can rely on statistical evidence of racially disparate impact in enhanced penalty cases. We propose that this Court craft a test for use in enhanced penalty cases whereby if reliable and valid statistical evidence shows that the statute in question affects exclusively, or almost exclusively, a racial minority, then that evidence should constitute proof of discriminatory purpose. The burden then should shift to the state to show that the law would have been adopted regardless of that discriminatory purpose for other, constitutionally permissible, purposes and that the statute achieves its permissible purposes with the least restrictive means available.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 22, 1994

APPENDICES

APPENDIX A

No. 75081, 75082, 75083 cons. - Agenda 8 - January 1994

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

R.L., a Minor,

Appellee.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

D.W., a Minor,

Appellee.

JUSTICE FREEMAN delivered the opinion of the court:

Section 5-4(7)(a) of the Juvenile Court Act of 1987 provides, under various circumstances, for the automatic transfer of cases of 15- and 16-year-old minors charged with drug offenses from the juvenile division of a circuit court to that court's criminal division. (Ill. Rev. Stat. 1991, ch. 37, par. 805-4(7)(a).) The question presented for review is whether this section, as applied to such minors charged with committing drug offenses on or near public housing property, denies such minors the equal protection of the laws. We hold that it does not.

BACKGROUND

On April 6, 1992, defendant D.W. was 16 years old. On that date, he was arrested and subsequently charged with delivering less than one gram of cocaine, which is a Class 2 felony. (Ill. Rev. Stat. 1991, ch. 56½, par. 1401(d).) He was also charged with performing

this act on a public way within 1,000 feet of Chicago Housing Authority property. This charge enhanced the penalty to a Class 1 felony (Ill. Rev. Stat. 1991, ch. 56½, par. 1407(b)(2)) and made the penalty nonprobationable (Ill. Rev. Stat. 1991, ch. 38, par. 1005-5-3(c)(2)(D).).

On December 22, 1991, defendant R.L. was 16 years old. On that date, he was arrested and subsequently charged with, *inter alia*, possessing 15.6 grams of cocaine with the intent to deliver, which is, by itself, a Class X felony (Ill. Rev. Stat. 1991, ch. 56½, par. 140l(a)(2)(A)) and nonprobationable (Ill. Rev. Stat. 1991, ch. 38, par. 1005-5-3(c)(2)(C)). He was charged with performing this act on Chicago Housing Authority property.

Since D.W. and R.L. were under 17 years of age at the time of these alleged offenses, they normally could not be prosecuted in the criminal division of a circuit court. However, section 5-4 of the Juvenile Court Act of 1987, sometimes referred to as the juvenile transfer statute, provides exceptions to this rule. Ill. Rev. Stat. 1991, ch. 37, par. 805-4(1).

One such exception in the juvenile transfer statute provides, in pertinent part, that juvenile court administration does not extend to a minor who was at least 15 years old at the time of the alleged offense, and who was charged with violating Section 401 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1991, ch. 56½, par. 1401) while on residential property owned, operated, and managed by a public housing agency, or on a public way within 1,000 feet of such property. "These charges and all other charges arising out of the same incident shall be prosecuted under the Illinois Controlled Substances Act." Ill. Rev. Stat. 1991, ch. 37, par. 805-4(7)(a).

Based on this provision, D.W. and R.L. were each arraigned in the criminal division of the circuit court of Cook County. Each defendant asked the trial court to dismiss the charge against him and declare both section 407 of the Illinois Controlled Substances Act and section 5-4(7)(a) of the Juvenile Court Act of 1987 unconstitutional.

The trial court ruled that section 5-4(7)(a), as applied to 15- and 16-year-old minors charged with drug offenses committed within 1,000 feet of public housing, denied such minors the equal protection of the laws. U.S. Const., amend. XIV; Ill. Const. 1970., art. I, §2.

The State appeals directly to this court. (134 Ill. 2d R. 603.) We reverse.

DISCUSSION

This court has repeatedly noted the presumption that all statutes are constitutional. The party challenging a statute has the burden of clearly establishing the alleged constitutional violations. A court must construe a statute so as to uphold the statute's constitutionality and validity if reasonably possible. If the statute's construction is doubtful, a court will resolve the doubt in favor of the statute's validity. *People v. Shephard* (1992), 152 Ill. 2d 489, 499.

Under both the Federal and Illinois Constitutions, the guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner. Equal protection prohibits the State from according unequal treatment to persons placed by a statute into difference classes for reasons wholly unrelated to the purpose of legislation. (*Shephard*, 152 Ill. 2d at 499.) However, equal protection does not preclude different treatment for like persons where there is a rational basis for so doing. *People v. P.H.* (1991), 145 Ill. 2d 209, 231; *Jenkins v. Wu* (1984), 102 Ill. 2d 468, 477.

In the present case, section 5-4(7)(a) contains a classification based on the location of the crime. A minor charged with committing a drug offense on a public way beyond 1,000 feet of public housing remains in the administration of the juvenile division of a circuit court. However, a minor charged with committing the same offense on a public way within 1,000 feet of public housing is automatically removed from a circuit court's juvenile division and is treated as an adult. Ill. Rev. Stat. 1991, ch. 37, par. 805-4(7)(a).

Strict Scrutiny

This court uses two standards of judicial review in assessing an equal protection challenge: strict scrutiny and rational basis review. This court applies strict scrutiny to certain "suspect" classifications, such as race, and to classifications that impinge on fundamental constitutional rights. A law will not survive strict scrutiny unless it is necessary to promote, and is narrowly tailored to serve, a compelling State interest. *Shephard*, 152 Ill. 2d at 500.

In the present case, the trial court subjected section 5-4(7)(a) of the Juvenile Court Act of 1987 to strict scrutiny. The trial court noted that the statutory classification, on its face, does not involve a suspect classification. However, the parties stipulated that approximately 90% of Chicago Housing Authority residents are black and less than 2% are white. The parties also stipulated that 34 transfers under section 5-4(7)(a) occurred in the circuit court of Cook County during a one-year period from August 1991 through July 1992, and that all of these minors were nonwhite.

Based on these stipulated facts, the trial court concluded that section 5-4(7)(a) has such a disparate impact on nonwhite minors as to create a *de facto* suspect classification. Based on this conclusion and, we note, without a finding of whether section 5-4(7)(a) is necessary to promote and is narrowly tailored to serve a compelling State interest, the trial court ruled that the provision violated the equal protection clauses of the Federal and Illinois Constitutions.

We initially note that the State and supporting *amicus*, the Chicago Housing Authority, assign error to the trial court's finding that the vast majority of public housing residents are people of color. Before this court, the State and the Chicago Housing Authority included in their briefs information that purports to show that public housing residents, statewide, are not all nonwhite. Defendants object and move to strike the information and references thereto from the State's and the Chicago Housing Authority's briefs.

We grant the motion to strike because we need not consider the information. Even if section 5-4(7)(a) has a racially disparate impact, we conclude that defendants have failed to prove that the legislature purposely intended to racially discriminate in enacting the provision.

It is true that the racially disparate impact of a law or policy is alone sufficient to state a claim under civil rights laws such as title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.* (1988)) or the Illinois Human Rights Act (Ill. Rev. Stat. 1991, ch. 68, par. 1-101 *et seq.*). (See *Board of Trustees of Southern Illinois University v. Knight* (1987), 163 Ill. App. 3d 289, 294; *Burnham City Hospital v. Human Rights Comm'n* (1984), 126 Ill. App. 3d 999, 1002, 1008.) However, "[t]his is not the constitutional rule." (*Washington v. Davis* (1976), 426 U.S. 229, 239, 48 L. Ed. 2d 597, 607, 96 S. Ct. 2040,

2047.) Rather, disparate impact alone is not enough to state a claim under the equal protection clause. *American Nurses Association v. State of Illinois* (7th Cir. 1986), 783 F.2d 716, 722.

The United States Supreme Court has "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. *** Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), 429 U.S. 252, 264-65, 50 L. Ed. 2d 450, 464, 97 S. Ct. 555, 563; accord *Personnel Administrator v. Feeney* (1979), 442 U.S. 256, 272, 60 L. Ed. 2d 870, 883, 99 S. Ct. 2282, 2293.) The absence of proof of discriminatory intent forecloses any claim that the challenged official action violates the equal protection clause. (*City of Memphis v. Greene* (1981), 451 U.S. 100, 119, 67 L. Ed. 2d 769, 785, 101 S. Ct. 1584, 1596.) This court has followed this principle. *People v. Wegielnik* (1992), 152 Ill. 2d 418, 429; *People v. Adams* (1992), 149 Ill. 2d 331, 352; accord *Tucker v. United States Department of Commerce* (7th Cir. 1992), 958 F.2d 1411, 1413-14.

Defendants and a supporting *amicus*, the Illinois State Bar Association, contend that the legislature at least partly intended to racially discriminate in enacting section 5-4(7)(a) of the Juvenile Court Act of 1987. Defendants point to the stipulated facts that the vast majority of Chicago Housing Authority residents are people of color, and that every single transfer under section 5-4(7)(a) during a one-year period has been that of a nonwhite minor. Defendants argue that this racially disproportionate impact is proof of discriminatory intent.

We disagree. It is true that a discriminatory purpose can be inferred from the totality of the relevant facts, including a racially disproportionate impact. (*Washington*, 426 U.S. at 242, 48 L. Ed. 2d at 608-09, 96 S. Ct. at 2048-49.) Sometimes a clear pattern, unexplainable on nonracial grounds, emerges from the effect of a statute, even when the law is facially neutral. However, "such cases are rare." *Arlington Heights*, 429 U.S. at 266, 50 L. Ed. 2d at 465, 97 S. Ct. at 564.

A facially neutral and otherwise valid law does not violate the equal protection clause simply because the law may affect a greater

proportion of one race than of another. Disproportionate impact is relevant, but it is not the sole determinative of unconstitutional racial discrimination. Disproportionate impact alone does not trigger strict scrutiny. *Washington*, 426 U.S. at 242, 48 L. Ed. 2d at 609. 96 S. Ct. at 2049.

Defendants also contend that the foreseeability of this racially disparate impact is additional proof that the legislature intended to racially discriminate in enacting section 5-4(7)(a). Defendants posit that the legislature was "fully aware of the racial composition of public housing." Defendants further point to speeches by several legislators during the debates on this provision. These statements purportedly notified the legislature of the racially disparate impact of the provision. Defendants further note that subsequent speakers during the debates ignored these concerns. Defendants conclude that the legislature's failure to address these concerns "shows the foreseeability of the impact and discriminatory intent in the enactment of [section 5-4(7)(a)]."

We cannot accept this reasoning. Defendants cite, *inter alia*, *Feeney*, 442 U.S. at 279 nn.24 & 25, 60 L. Ed. 2d at 887, 888 nn.24 & 25, 99 S. Ct. at 2296 nn.24 & 25, for the proposition that inevitable adverse consequences support a strong inference of intent. However, this passage is immediately followed by a *caveat:*

> "But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof." *Feeney*, 442 U.S. at 279 n.25, 60 L. Ed. 2d at 888 n.25, 99 S. Ct. at 2296 n.25.

Feeney actually opposes defendants' position. The rule in *Feeney* is that "[e]ven conscious awareness on the part of the legislature that the law will have a racially disparate impact does not invalidate an otherwise valid law, so long as that awareness played

no causal role in the passage of the statute." *United States v. Frazier* (3d Cir. 1992), 981 F.2d 92, 95, citing *Feeney*, 442 U.S. at 279, 60 L. Ed. 2d at 887-88, 99 S. Ct. at 2296.

It is true that legislative debates on a statute are a proper source in determining whether a legislature had a racially discriminatory intent in enacting the law. (*Arlington Heights*, 429 U.S. at 268, 50 L. Ed. 2d at 466, 97 S. Ct. at 565.) However:

> "Statements made by members of the General Assembly in legislative debate assist in revealing the legislative intent behind a statute only when examined in the context of the debate in its entirety. 'Legislative intent' speaks to the will of the legislature as a collective body, rather than the will of individual legislators." *Morel v. Coronet Insurance Co.* (1987), 117 Ill. 2d 18, 24."

Thus, courts generally give statements by individual legislators in a floor debate little weight when searching for the intent of the entire legislative body. (*Castaneda-Gonzalez v. Immigration & Naturalization Service* (D.C. Cir. 1977), 564 F.2d 417, 424; accord *Butts v. City of New York Department of Housing Preservation & Development* (2d Cir. 1993), 990 F.2d 1397, 1405.) Such statements by themselves do not affirmatively establish the intent of the legislature. (*See Craddock v. Board of Education of Annawan Community Unit School District No. 226* (1979), 76 Ill. App. 3d 43, 52.) In the present case, we will not ascribe the views of a few legislators to the entire legislature.

We further conclude, for reasons which we will discuss later, that section 5-4(7)(a) is reasonable. After carefully reviewing the trial record, we conclude that if any inference of racial discrimination existed, it failed to ripen into proof. See *Price v. Austin Independent School District* (5th Cir. 1991), 945 F.2d, 1307, 1319.

Therefore, the trial court erred by ruling that the provision created a *de facto* suspect classification. "A law that does not implicate either a suspect classification or a fundamental right is subject to rational basis review." (*Shephard*, 152 Ill. 2d at 500; accord *Frazier*, 981 F.2d at 95.) Accordingly, we will subject section 5-4(7)(a) to rational basis review.

Rational Basis

Defendants note that crime exists statewide and not only in public housing. Thus, defendants contend, no rational basis exists for treating 15- and 16-year-old minors who are charged with committing drug offenses near public housing differently than those who are charged with committing those offenses away from public housing.

Under the rational basis test, a statutory classification need only be rationally related to a legitimate State goal. A statute must have only a rational basis for distinguishing the class to which the law applies from the class to which the law does not apply. Under this test, a court's review of a legislative classification is limited and generally deferential. The legislature, under the State's police power, has wide discretion to classify offenses and prescribe penalties for those offenses. Thus, if any set of facts can reasonably be conceived to justify the statute it must be upheld. *Shephard*, 152 Ill. 2d at 500, 502.

Further, the State may direct a law against what it considers to be a problem as it actually exists. The statute need not cover the whole field of possible abuse. The legislature may enact a law that addresses the area of concern that seems most acute. *Shephard*, 152 Ill. 2d at 502.

We conclude that a rational basis exists for the classification created by section 5-4(7)(a) of the Juvenile Court Act of 1987. The classification at issue here is based on the location of the charged offense. This is a permissible distinction. (*Shephard*, 152 Ill. 2d at 503.) What this court stated in *Shephard* concerning adults applies equally to 15- and 16-year-old minors:

> "[T]he purpose of the law was simply to deter narcotics activity in public housing, an area where the impact of this evil has been severe. Further, providing a more severe penalty for such conduct is a reasonable means of accomplishing such deterrence." (*Shephard*, 152 Ill. 2d at 503.)

Prosecuting 15- and 16-year-old minors as adults is also a reasonable means of accomplishing such deterrence. *P.H.*, 145 Ill. 2d at 231-32.

"Whether a statute is wise or unwise, and whether it is the best means to achieve the desired results, are among the matters for the legislature and not the courts." (*Shephard*, 152 Ill. 2d at 503.) As the Court noted in *Feeney*:

> "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Feeney*, 442 U.S. at 271-72, 60 L. Ed. 2d at 883, 99 S. Ct. at 2292.

Accord *P.H.*, 145 Ill. 2d at 232.

We hold that section 5-4(7)(a) of the Juvenile Court Act of 1987 does not deny 15- and 16-year-old minors, charged with drug offenses committed on or near public housing, the equal protection of the laws.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

APPENDIX B

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	CRIMINAL NUMBERS:
	)	92-CR-4907
Plaintiff,	)	92-CR-9852
	)	92-CR-9828
v.	)	
	)	
RASHAUN LAWRENCE & DEWAN WHITE,	)	Charge: POSSESSION OF
	)	CONTROLLED SUBSTANCE
Defendants.	)	

OPINION

THE COURT: The People charged Rashaun Lawrence and Dewan White with three separate, unrelated charges of delivery of a controlled substance, in violation of Chapter 56 and-a-half, Section 1401 as it relates to Chapter 56 and-a-half 1407-B-2. Both defendants are under the age of 17 and have attained the age of 15.

Illinois Revised Statutes, Chapter 56 and-a-half, Section 1407-B provides...

> "Illinois Revised Statute, Chapter 37, Section 805-4 (7)-A provides as follows:

> "The definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of the offense was at least 15 years of age and who is charged with an offense under Section 401 of the Illinois Controlled Substance Act while in a school ... or residential property owned, operated and managed by a public housing agency, on the real property comprising any school or residential property owned, operated and managed by a public housing agency. School is defined, for the purposes of this Section, as any public or private elementary or secondary school, community college, college or university. These charges and all other charges arising out of the same incident shall be prosecuted pursuant to the Illinois Controlled Substance Act."

In its continuing efforts to battle our drug crisis, the Illinois Legislature has enacted a series of acts which focus on problem areas. The first to be singled out for special attention were our schools. Then the Legislature amended the provisions of Chapter 56 1/2, Section 407-B to enlarge it to property owned by parks. Finally, enhanced penalties are set out in the Act for persons involved with public housing.

Schools are attended by all persons under the age of 16 within our society. Parks are frequented by all people living within our society. Public housing is usually limited to poor people living in our society.

The three cases at bar involve both automatic transfer of juveniles of the age of 15. The Act mandates that they be tried as adults. At the same time, the amendments to Chapter 56 1/2 mandate enhanced penalties for all people violating the provision of 56 1/2 who do so in or near public housing; i.e., "Residential property owned, operated and managed by public housing agency..."

The Illinois Supreme Court's Opinion in People versus O.C. Shephard, Docket Number 72085 has resolved the enhanced penalty issue as regards non-juveniles charged with violations of Section 407(b). The Supreme Court in that opinion discussed both the Strict Scrutiny and the Rational Basis Test. The Court determined that the Strict Scrutiny did not apply, since Chapter 56 1/2, 407(b) does not

implicate either a suspect classification or a fundamental right. The Supreme Court found that the trial court's opinion that there was no rational basis for the classification created by Section 407(b) was in error.

A review of the Shephard Opinion, however, indicates that no substantial issue of suspect classification such as race was raised. Moreover, Shephard does not concern an Automatic Juvenile Transfer. The opinion of this Court now addresses Automatic Transfer of 15 and 16 years olds and subsequent prosecution under Section 407(b).

Juveniles have been, traditionally, afforded special protection in our society. The Automatic Transfer Provision of this Act results in two significant effects on juveniles prosecuted under it:

1. They strip away the protection of the Juvenile Court Act.

2. They enhance through operation of Section 407(b), the penalty for violations committed by 15 and 16 year olds to harsher penalties, often with mandatory minimum prison sentences.

It becomes extremely important, therefore, to look at just exactly who is being affected.

This Court would note that most 15 and 16 year olds do not pick the sites of their residence; rather, it is picked for them by whatever adult, usually a parent with whom they live. While it is alleged conduct of drug violations and not the residence of the alleged offender that triggers Automatic Juvenile Transfer, the simple fact is that 15 and 16 year olds tend to do whatever it is they are going to do in their own neighborhood. This is true whether they are playing games with other children, running an errand for their mother, or abusing drugs. It is extremely unlikely that Automatic Juvenile Transfer for public housing violations will ever affect any white 15 or 16 year old from Sauganash, Bridgeport, or Arlington Heights. Fifteen and 16 year olds from white, middle class neighborhoods will be subject to neither Automatic Transfer, nor enhanced penalties.

By stipulation the parties have established the following:

(1) Less than 2% of the Chicago Housing Authority residents are white;

(2) The remaining 90+ percent are people of color, mostly African/Americans;

(3) Only 8.5% of the residents are employed;

(4) Almost all receive some form of Public Aid;

(5) EVERY SINGLE Automatic Transfer invoking the Public Housing Provision has been an Automatic Transfer of a person of color, mostly African/American.

This Court concludes that although the Statute does not disclose a discriminating racial impact on its face, the stipulated C.H.A. statistics when coupled with the stipulated fact the every single automatic transfer has been of a 15 or 16-year-old person of color, establishes that the impact of Automatic Transfer for Public Housing offenses has been exclusively borne by poor people of color. This is clearly a de facto Suspect Classification.

The floor debate in the Illinois House of Representatives establishes a clear legislative intent that only acts in public housing be affected. The penalties are not raised, nor are Juvenile Transfers mandated for 15 and 16 year olds committing the same offense, but not in public housing.

Perhaps Representative Davis says it best in these words: "Are we going to legislate a different criminal code... for those who live in public housing environments — that will be different than people that come from Elmhurst, or people that come from the north side of Chicago? Crime is crime... we cannot in this body decide that if you live in public housing and you commit a crime that your sentence will be greater than those who don't live in public housing and commit a crime..."

Perhaps, the floor debate between Representative Jones and the Bill Sponsor, Representative DeLeo best indicates the Legislature's intent:

> "JONES, S.: Why is this Bill only geared toward public housing?"
>
> "DeLEO: Well, again, this is just extending the safe school zone protection area. And why... this is... this legislation is... the intent of the Legislation is to reduce

gang activity in public housing facilities. This isn't every crime. We're talking about firearms and drugs. The same thing that's in the present Legislation, two various serious crimes. To echo Representative Homer's remarks, we're trying to produce safe housing for people, not have children induced into gangs. This Legislation deals with two parts of the law; drugs and firearms. I don't think drugs and firearms belong in any community. We have to have safe zones and we have to show that there's an increase in penalties if you're going to be caught with these illegal drugs or illegal firearms."

"JONES, S.: I understand that, but I also know by... also living in the City of Chicago that gangs are not only in public housing, they are citywide. My question again is, why is it just public housing? If you want this type of legislation, which I am against, because of... it's too... it's too broad, number one, and why is it just geared toward public housing, they're located in the entire City of Chicago."

This Court concludes that the clear statistical data from the Chicago Housing Authority, considering the fact that the Automatic Transfer Statute has resulted in the actual transfer of only people of color, when coupled with the legislative colloquy indicates a discriminatory result; if not also discriminatory purposes and intent.

This Court further concludes that the African-American opponents who spoke against this Legislation clearly sensed this but were, apparently, too polite to articulate a charge of racial discrimination.

Accordingly, the Court finds that the Legislation as it affects 15 and 16 year olds, subjecting them to Automatic Transfer is unconstitutional and violative of the equal protection clauses of 14th Amendment to the United States Constitution and the Equal Protection Provisions of the Illinois Constitution.

The motion to dismiss these charges is allowed and the matter is transferred to the Juvenile Division of the Circuit Court pending appeal.

MICHAEL BRENNAN BETTY,
JUDGE CIRCUIT COURT OF
COOK COUNTY CRIMINAL
DIVISION

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

705 ILCS 405/1-2(3)(b):

> (3) In all procedures under this Act, the following shall apply:
>
> (b) Every child has a right to services necessary to his or her proper development, including health, education and social services.

705 ILCS 405/5-4(1):

> 5-4. Criminal prosecutions limited. (1) Except as provided in this Section, no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of an ordinance of any political subdivision of this State.

705 ILCS 405/5-4(7)(a):

> (7)(a) The definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with an offense under Section 401 of the

Illinois Controlled Substances Act while in a school, regardless of the time of day or the time of year, or any conveyance owned, leased or contracted by a school to transport students to or from school or a school related activity, or residential property owned, operated and managed by a public housing agency, on the real property comprising any school, regardless of the tie of day or the time of year, or residential property owned, operated and managed by a public housing agency, or on a public way within 1,000 feet of the real property comprising any school, regardless of the time of day or the time of year, or residential property owned, operated and managed by a public housing agency. School is defined, for the purposes of this Section, as any public or private elementary or secondary school, community college, college, or university. These charges and all other charges arising out of the same incident shall be prosecuted under the Illinois Controlled Substances Act.

Supreme Court, U.S.
FILED
JUL 28 1994
OFFICE OF THE CLERK

No. 93-2067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEWAN WHITE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

RASHAUN B. LAWRENCE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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19 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Did the Illinois Supreme Court correctly conclude that the legislature did not intentionally discriminate on the basis of race when enacting a law subjecting young adults to criminal court procedures and sanctions for distributing narcotics on or near public housing property.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEWAN WHITE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RASHAUN B. LAWRENCE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner seeks review of a judgment of the Supreme Court of Illinois in the above cause.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Illinois was entered on March 24, 1994. Petitioner invokes this Court's jurisdiction to review the propriety of the state court order pursuant to 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, amendment XIV, section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

On January 20, 1992, Dewan White delivered to an undercover police officer a substance containing less than one gram of cocaine. The delivery occurred on a public way at 756 E. 38th Street in Chicago. (1 White CLR, pp. 3, 5). That location is within 1000 feet of property owned, operated and managed by the Chicago Housing Authority.

On January 28, 1992, Dewan White delivered to an undercover police officer a substance containing less than one gram of cocaine. The delivery occurred on a public way at 746 E. 38th Street in Chicago. (1 White CLR, p. 4). That location is also within 1000 feet of property owned, operated and managed by the Chicago Housing Authority.

White was charged with two counts of delivering a controlled substance on a public way within 1000 feet of real property owned, operated and managed by a public housing authority in violation of 720 ILCS 570/401(c) and 570/407(b)(2). (1 White CLR, pp. 3-4). White was 16 years old at the time of the incident and resided at 706 E. 38th Street in Chicago. (1 White CLR, p. 7).

On December 22, 1991, a police officer observed Rashaun Lawrence in a vacant apartment with a clear bag containing numerous smaller green bags believed to contain cocaine. The apartment was located at 527 E. Browning in Chicago, property owned, operated and managed by the Chicago Housing Authority and commonly known as the Ida B. Wells community. The officer approached Lawrence and retrieved the clear plastic bag. Lawrence was searched and another similar clear plastic bag was found in his pocket. The two clear bags contained 68 green plastic bags containing white rocks suspected to be cocaine. The bags contained over 23 grams of cocaine. Lawrence also had $308.00 in his possession. (1 Lawrence CLR, pp. 5-9).

Lawrence was charged with possession with intent to deliver a controlled substance on property owned, operated and managed by a public housing authority, a violation of 720 ILCS 570/401(a)(1)(A). Lawrence was also charged with criminal trespass to state supported land in violation of 720 ILCS 5/21-5(a). (1 Lawrence CLR, p. 6). Lawrence was 16 years of age at the time of the offense and resided at 525 E. 37th Street in Chicago, Illinois. (1 Lawrence CLR, pp. 25-28).

Pursuant to 705 ILCS 405/5-4(7)(a), the juvenile code is inapplicable to juveniles 15 or 16 years of age who are charged with violating certain narcotics offenses on or near public housing property. Juveniles charged with these offenses must be tried and sentenced under the criminal code. Because the juvenile and criminal codes are applied by separate courts in Cook County, the public housing exemption to the juvenile code has been characterized by its procedural effect as a statute requiring the "automatic transfer" of the juvenile. *People v. P.H.*, 582 N.E.2d 700, 705-06 (Ill. 1991).

The defendants filed motions with the court challenging the constitutionality of the automatic transfer statute on several grounds. Ruling on the motions in both cases, the Circuit Court held that application of the criminal code to juveniles accused of possession with intent to deliver controlled substances on or within 1000 feet of property owned, operated and managed by a public housing agency violated the equal protection provisions of the state and federal constitutions. (Op. at 6; 1 Lawrence CLR, p. 51, 1 White CLR, p. 38).

The court opined that application of the law had not resulted in the prosecution under the criminal code of any white juvenile offenders in Chicago. The court stated, "It is extremely unlikely that [the] Automatic Juvenile Transfer for public housing violations will ever affect any white 15 or 16 year olds from Sauganash, Bridgeport, or Arlington Heights. Fifteen and 16 year olds from white, middle class neighborhoods will be subject to neither Automatic Transfer, nor enhanced penalties." (Op. at 4; 1 Lawrence CLR, p. 49, 1 White CLR, p. 36). The court stated further, "[t]his Court concludes that the clear statistical data from the Chicago Housing Authority, considering the fact that the Automatic Transfer Statute has resulted in the actual transfer of only people of color, when coupled with the legislative colloquy indicates a discriminatory result; if not also discriminatory purposes and intent." (Op. at 6; 1 Lawrence CLR., p. 51; 1 White CLR, p. 79). Therefore, the court concluded that the law violated the equal protection constitutional provisions.

The People filed notices of substantial impairment and sought review of the court's decision. (1 Lawrence CLR, pp. 52-57; 1 White CLR, pp. 80-85).

The Supreme Court of Illinois reversed, finding several fatal flaws in defendants' numerical information and in the

reasoning supporting the trial court opinion. Specifically, the court found that defendants failed to present any information that could constitute proof of discrimination on the part of the legislature in enacting the statute, a necessary component of defendants' constitutional claim.

REASONS FOR DENYING THE WRIT

Defendants attempt to characterize this case as some kind of significant opportunity to rewrite equal protection constitutional law as it relates to criminal statutes. The Court should deny the writ because this case presents no such opportunity. Defendants' case is simply another attempt to use the Court to change a legislative policy with which counsel for the defendants disagree, in this case the practice of trying young adults under the criminal code.

Defendants' case is premised upon what they call "compelling statistical evidence." Defendants' so-called "compelling statistical evidence", however, fails to support any of the conclusions for which they offer it. Simply put, defendants' numbers are meaningless. The well-settled legal principles regarding the Equal Protection Clause of the Constitution were applied correctly by the Illinois Supreme Court to the very weak facts of this case.

A. DEFENDANTS OVERSTATE THE SIGNIFICANCE OF THEIR SO-CALLED STATISTICAL EVIDENCE.

Defendants contend that their case is premised on "compelling statistical evidence." From this compelling statistical evidence, defendants wish the Court to infer that the Illinois General Assembly intended to discriminate against African Americans when it enacted the statute

under which they have been prosecuted.[1] A close examination of this "compelling statistical evidence", however, reveals that it is neither compelling, nor statistical, nor evidence of anything.

Defendants' "statistical evidence" consists of two items: (1) a list of names and the race of the 34 persons charged in Chicago under the statute as adults from August, 1991 to July, 1992; and (2) a recitation of the racial composition of Chicago Housing Authority residents. That is all they offer.

These "statistics" prove nothing in this case.

The Illinois Supreme Court was not impressed with defendants' "compelling statistical evidence." The defendants

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[1] Defendants do not allege that they were discriminated against by the police, or the prosecutors, or the judges, or the sentencing commission, or the parole board, as is more typical in these types of cases. Generally, defendants in these cases allege that the statute was enforced in a discriminatory manner, and that they were individually victimized by that discriminatory enforcement. *See e.g., Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983). Defendants make no such allegation in this case. In *Facion v. State*, 627 So. 2d 1144 (Ala. App. 1993), in response to a claim that Alabama's public housing enhancement statute's application to him violated his equal protection rights, an Alabama appellate court stated:

> This court has previously held that, although no clear standards for quantum or type of proof sufficient to illustrate discriminatory enforcement of a statute . . . , three elements must generally be proved: selectivity in enforcement, selectivity that is intentional; and selectivity based upon some invidious or unjustifiable standard such as race, religion, or other arbitrary classification. It is insufficient merely to show that other violators have not been prosecuted, that there has been laxity in enforcement, or that there has been conscious exercise of some selectivity in enforcement.

Id. (quoting, *De Shazo v. Huntsville*, 416 So.2d 1100, 1103 (Ala. Cr. App. 1982). The court rejected the defendant's arguments.

continue to represent that these numbers unquestionably prove disparate impact. No one else shares that conclusion. While the state court dismissed the challenge because the defendants did not come close to proving any intentional discrimination, the court did not conclude that the defendants had proven disparate impact. The state court simply disposed of defendants' weak case on its most obvious and glaring defect. Defendants' statistics prove nothing relevant to their charge because (1) they relate only to Chicago while the statute has statewide applicability and public housing developments exist throughout Illinois; (2) they fail to prove or suggest that the statute is the cause of any disparate effect; and (3) they falsely assume that the only people who commit crimes near public housing developments are residents.

First, the statute challenged is a statewide statute while the numerical information offered by defendants regards only part of the state to which this statute applies.

The defendants' list of individuals subjected to the statute over a 12-month period were culled from the records of the Cook County Circuit Court Criminal Division. These records do not reflect the use of this statute in suburban Cook County or the rest of Illinois. Defendants' statements that these were the only persons subject to the statute during the 12 month period are unsupported. The defendants have absolutely no idea regarding this statute's use outside of Chicago.

Defendants' information on public housing units falsely assumes that public housing developments do not exist outside of Chicago. Respondents and the Chicago Housing Authority, in an amicus brief, offered information to the Illinois Supreme Court which showed that of the 82,770 public housing dwelling units in Illinois, only 42,510 units

were in Chicago. In addition, the information presented demonstrated that the racial composition of public housing statewide was quite different than the racial composition of Chicago Housing Authority residents.[2]

The statute is a statewide statute. The statute applies to public housing developments throughout Illinois. As the bill's sponsor noted during debate in the Illinois House of Representatives, "not only does [the law] include CHA, it includes *any* public [housing] facilities." (86 General Assembly, June 15, 1989, p. 153, Illinois Senate Bill 1270) (emphasis added). If the legislature intended to limit the applicability of the statute to Chicago or Cook County, it could, as it has, with court approval, on numerous occasions. *See e.g., Fried v. Danaher*, 263 N.E.2d 820 (Ill. 1970) (*citing Hunt v. Rosenbaum Grain Corp.*, 189 N.E. 907 (Ill. 1934)); *Hamer v. Bd. of Educ.*, 265 N.E.2d 616 (Ill. 1970); *Mlade v. Finley*, 445 N.E.2d 1240 (Ill. App. 1983). Clearly, defendants' numerical data is faulty because it attempts to condemn a statewide statute with its alleged effect on only one corner of the state.

Second, these "statistics" fail to suggest or infer that the statute is the cause of any alleged disproportionate impact.

Countless experts have struggled with the issue of overrepresentation of minorities in our criminal justice system and no reasonable person would conclude that this problem is the result of intentional discrimination by the legislature. Defendants' analysis does not include whether any

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[2] Defendants did not believe the court should consider this information and filed motions to strike it from the State and amicus briefs. The court granted the motion to strike because it did not need the information to find fault with defendants' case.

young caucasian adults have been charged with the same narcotics offenses in delinquency petitions.

Defendants attempt to use the complexity of the issue regarding the relationship between race and involvement in the criminal justice system to invite the Court to create an easier threshold for defendants to challenge criminal statutes. No test, however, can bridge the chasm between the numbers they masquerade as statistics and their conclusions. The complexity of the issue of overrepresentation is not addressed whatsoever by the simple figures recited by defendants. "The leap from that data to the conclusion of discriminatory intent or purpose leaves untouched countless racially neutral variables." *Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir. 1982). *See Knight v. Dugger*, 863 F.2d 705, 743 (11th Cir. 1988) (stating, "generalized studies might never be sufficient to show specific intent. Rather, these studies have 'little hope of excluding every possible factor that might make a difference between crimes and defendant, exclusive of race' ").

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court insisted that the relationship between the statistics and the decision to which the statistics attack be strong and meaningful. *Id.* at 294-99 and n.13-n.21. This Court has specifically rejected proposed inferences from statistical information as indicative of the ill motives alleged by the plaintiffs in many cases. *See e.g., McCleskey*, 481 U.S. 279 (1987); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Defendants simple figures do not begin to address or identify the source of any problem they may have identified.

Third, and finally, the "statistics" assume that the statute applies to persons who live in public housing—which is incorrect. The statute concerns only the place where the offense occurs. These statistics are used to disguise

an argument rejected soundly by the Illinois Supreme Court in an earlier case: the statute does not care where a person lives, but where he or she commits a crime. The Illinois Supreme Court stated:

> We initially note that defendant misperceives the nature of the classification created by section 407(b) of the Act. Defendant contends that section 407(b) punishes offenders who live in public housing more severely than those who can afford to live in non-public housing. Thus, defendant reasons, the classification is based on a defendant's ability to live in non-public housing and not on his or her own conduct.
>
> However, a cursory reading of section 407(b) shows that the residence and wealth of a drug offender are simply irrelevant to the offender's susceptibility to prosecution under section 407(b). The statute does not regard where a drug offender lives; it regards only where a drug offense occurs.

People v. Shephard, 605 N.E.2d 518, 523 (Ill. 1992). When the legislature has specifically stated and drafted a law that deems the residence of the offender irrelevant, statistics about the residents of public housing are not meaningful. Defendants simply say that 15 and 16 year olds are more likely to commit crimes where they live. Defendants have offered no support for this statement other than it being their opinion.[3]

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[3] It should also be noted that defendants were not residents of the public housing buildings in which they allegedly distributed narcotics. Defendant White resided at 706 E. 38th Street in Chicago, while the alleged offense occurred on a public way at 756 E. 38th Street in Chicago. (1 White CLR, pp. 3, 5, 7). Defendant Lawrence resided at 525 E. 37th Street in Chicago, Illinois, while his alleged offense occurred at 527 E. Browning in Chicago. (1 Lawrence CLR, pp. 5-9, 25-28).

Defendants' "compelling statistical evidence" is a sham. All of the reasons they offer to support their petition for a writ are premised on the alleged unique opportunity this case offers the Court because of its sound factual base. Their description of their case and record to not conform to the facts.

B. THE SUPREME COURT OF ILLINOIS CORRECTLY APPLIED WELL-SETTLED LAW TO DEFENDANTS' FACTUALLY WEAK CASE.

The Illinois Supreme Court correctly applied well-settled law to the unremarkable facts of this case.

The court's analysis "[began] with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (quoting, *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). As defendants admit, they must prove that they were not only the victims of discrimination, but that such discrimination was intentional. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 264-65; *see also, Knight v. Dugger*, 863 F.2d 705, 743 (11th Cir. 1988) (stating, "intent, purpose and motive to discriminate racially must be shown").[4]

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[4] Defendants wish for the Court to infer discriminatory intent by the General Assembly based upon their selective recitation of statements from the law's opponents during the legislative debate. The statements of the laws supporters are far more indicative of

(Footnote continued on following page)

Defendants, as correctly stated by the Illinois Supreme Court, failed to prove with their "compelling statistical evidence" even a prima facia case of discrimination against the General Assembly. This Court has long recognized the limited utility of statistics to create an inference of discrimination, but it has also cautioned about the danger of their use to invalidate a race neutral legislative act. In *Washington v. Davis*, 426 U.S. 229 (1976), a case upon which defendants heavily relied, the Court warned against accepting at face value information like that proffered by defendants. The Court stated:

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[4] *continued*

the General Assembly's intent. For example, Representative Thomas Homer (D-Fulton) stated:

> [The bill] extends that concept to those *residential public housing projects in the state*, to recognizing that there are special inherent problems that have arisen in those facilities and has caused many, many moments of agony for parents who do not feel that they can send their children outside the halls of their own residence, secure in the knowledge that those children won't be preyed upon by the dope dealers and those who use firearms to violate the law. This Bill is a victim's rights Bill. It looks to the victims. It tries to protect residents of public housing projects, who have been particularly vulnerable to the crimes preyed upon them by this criminal element.

(86 General Assembly, June 15, 1989, pp. 154-55, Illinois Senate Bill 1270) (emphasis added). State Representative Jesse White (D-Chicago) stated:

> . . . I stand in support of this wonderful piece of legislation. I have a housing development in my district called Cabrini Green, and the people there are sick and tired of being shot at, drugs being sold out in the open, and they think that . . . special attention should be given to this matter, in that they want to live in peace and harmony with their neighbors and friends.

(86 General Assembly, June 15, 1989, p. 160, Illinois Senate Bill 1270).

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Washington, 426 U.S. at 248; *see also Mobile v. Bolden*, 446 U.S. 55, 133 (1980) (Marshall, J., dissenting) (same); *Washington*, 426 U.S. at 248 n.15.

Like the accusers in *McCleskey*, *Washington* and *Arlington Heights*, the accusers in this case, the defendants, have "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor" in the General Assembly's decision to enact this statute.[5] *Arlington Heights*, 429 U.S. at 270. *See also*, *Washington v. Seattle School Dist.*, 458 U.S. 457, 485 (1982) (cautioning against using statistics to challenge "legislation intended

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[5] Before the Illinois Supreme Court, defendants' contended that the information they have set forth is more indicative of discrimination than the information set forth in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The indications of the statistics offered by defendants do not approach the relevance and persuasiveness of the statistics offered in these two cases. In *Gomillion*, the state legislature altered the boundaries of a particular city "from a square to an uncouth twenty-eight-sided figure" to exclude black voters. *Gomillion*, 364 U.S. at 340. In *Yick Wo*, a city passed an ordinance prohibiting 310 laundries housed in wooden buildings from operating without a permit. When the laundry owners applied for permits, all but one of the white applicants received permits while all of the over 200 Chinese applicants were denied permits. *Yick Wo*, 118 U.S. at 373. *See*, *McCleskey*, 481 U.S. at 293 n.12. As the Illinois Supreme Court stated politely, defendants' numerical information is really indicative of nothing.

to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented"); *Washington*, 426 U.S. at 255 (Stevens, J. concurring) (stating, "[t]hat evidence, without more, is not sufficient to overcome the presumption that a test which is widely used by the Federal Government is in fact neutral in its effect as well as its 'purpose' as that term is used in constitutional adjudication").

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 93-2067

IN THE

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OCTOBER TERM, 1994

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v.

PEOPLE OF THE STATE OF ILLINOIS, Respondents.

RASHAUN B. LAWRENCE, Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS, Respondents.

RESPONSE TO MOTION TO STRIKE PORTIONS OF BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, the People of the State of Illinois, respectfully ask this Court to deny Petitioners' Motion to Strike Portions of Brief in Opposition to Petition for Writ of Certiorari.

1. Petitioners seek review of the decision of the Illinois Supreme Court upholding the constitutionality of a law that permits young adults charged with committing certain narcotics offenses within 1000 feet of public housing property to be subject to the criminal code rather than the juvenile code.

2. Petitioners filed a motion to strike the following passage from the People's Opposition Brief:

> Respondents and the Chicago Housing Authority, in an amicus brief, offered information to the Illinois Supreme Court which showed that of the 82,770 public housing dwelling units in Illinois, only 42,510 units were in Chicago. In addition, the information presented demonstrated that the racial composition of public housing was quite different than the

> racial composition of Chicago Housing Authority residents.

(Opp. Br. at 7-8.) The above passage was followed by a note stating:

> Defendants did not believe the court should consider this information and filed motions to strike it from the State and amicus briefs. The court granted the motion to strike because it did not need the information to find fault with defendants' case.

(Opp. Br. at 8 n.2.) Specifically, the court stated: "We grant the motion to strike because we need not consider the information." People v. R.L., 634 N.W.2d 733, 736 (1994). The above statements are accurate summaries of the procedural history of this case and for that reason alone are therefore proper.

3. Petitioners ought to demand from themselves the same restraint they puportedly seek from the People. In their reply brief, Petitioners have no problem with "offering the Court" information that was not presented by anyone to any court. See e.g., Reply Br. at 2 (stating, "...Whites account for eighty percent of the illegal drug use in this country, yet African Americans are arrested at four to five times the rate of Whites"); Reply Br. at Appendix A (Reports and Proposals:Sentencing Commission's Symposium on Drugs and Violence Puts Emphasis on Prevention); Reply Br. at Appendix B (The Illinois Supreme Court Special Commission on the Administration of Justice: Final Report, Part II, December, 1993). While the above information looks quite similar to the material to which petitioners object, the subject of petitioners' motion is utter silliness that the State will not reciprocate.

4. Petitioners' case is premised on a stereotype that cannot go uncorrected. Petitioners disguised their prejudice toward public housing developments in the lower courts, but now that prejudice has been exposed. Petitioners believe that "'public housing' means 'Black neighborhood' in Illinois", and "the term 'public housing,' at least in Illinois and particularly with regard to the CHA, is a 'code word' for African Americans...." (Reply Br. at 3, 4.) The information presented by respondents, which is common sense to anyone who cares to examine the facts, directly refutes the unsubstantiated stereotype that petitioners have continuously spewed throughout this appellate process. Petitioners should not be allowed to perpetuate a stereotype and to state in a legal document that low income equals race.

5. If Ciucci v. Illinois, 356 U.S. 571, 573 (1957), is all that supports petitioners' position, it has no support. In Ciucci, the material before the Court was described as follows:

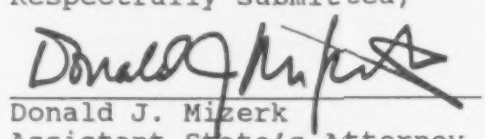
> In his brief in this Court petitioner has appended a number of articles which had appeared in Chicago newspapers after the first and second trials attributing to the prosecution certain statements expressing extreme dissatisfaction with the prison sentence fixed by the jury and announcing a determined purpose to prosecute petitioner until a death sentence was obtained.

Id. at 572-73. The above material is hardly analogous to the reference made in the People's brief. In addition, the quotation cited by petitioner can fairly be attributed only to two justices. Id. at 573 (attributing the reasoning to Justices Frankfurter and Harlan).

6. Striking the challenged language from the People's brief will not change the facts--public housing exists in large numbers outside the city of Chicago. The information petitioners seek to hide from the Court simply draws attention to the errors counsel has made in presenting their case. Because they have ignored facts relating to the statewide applicability of the statute, the information petitioners presented in the trial court became incomplete and irrelevant.

Petitioners' motion should be denied because the People accurately stated the facts of this case, because the statement is necessary to correct unsupported misstatements in petitioners' argument and because the information is basic and merely a factual account of knowledge that is common sense to most sane and informed people.

Respectfully submitted,



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Dated: August 17, 1994

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FILED
AUG 12 1994
OFFICE OF THE CLERK

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Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners and Respondents agree that the relationship between race and involvement in the criminal justice system is a complex one over which countless experts have struggled. (Opp. Br. pp. 8-9). Rather than address the root causes of the problem, including racially segregated housing resulting in large measure from government conduct or conduct sanctioned by the government, the General Assembly has flailed out against the most vulnerable subjects of the unconstitutional actions, African-American children. Petitioners do not seek review by this Court merely because the statutes in issue are bad public policy. Petitioners seek review because the General Assembly knew the public housing provision Illinois Juvenile Transfer Act would disparately affect African-

American children; because the Act creates a *de facto* racial classification; because the Act, as expected, affected *only* African-American children; because the Illinois Supreme Court erroneously applied a rational basis test to review the constitutionality of that classification; because other courts around the country have applied different constitutional tests to *de facto* racial classifications; and because considerations of federalism demand a uniform constitutional test.

Unfortunately, the well-intentioned war on drugs has, to a large extent, degenerated into a race war. For example, it has been estimated that Whites account for eighty percent of the illegal drug use in this country, yet African Americans are arrested at four to five times the rate of Whites. *See* U.S. SENTENCING COMM'N SYMPOSIUM ON DRUGS AND VIOLENCE, 53 CrL 1265-68 (June 23, 1993) (attached hereto as Appendix A); ILL. S. CT. SPECIAL COMM'N ON THE ADMIN. OF JUSTICE, FINAL REPORT, Part II, ch. VI, p. 61 n.93 (Dec. 1993) (attached hereto as Appendix B). In Illinois, the General Assembly, through the Juvenile Transfer Act, 705 ILCS 405/3-4(7)(a), has declared African-American children living in or around unconstitutionally segregated housing projects the enemy and aimed the strategic weapon of enhanced penalties at them as its target of opportunity.

In an attempt to avoid the principle that the State must be held constitutionally accountable for the foreseeable discriminatory consequences of the actions of its legislature, Respondents ignore or denigrate the evidence of record and engage in rank speculation based on "evidence" properly stricken below. Moreover, in a case calling for the utmost common sense and candor, Respondents' arguments for denying the Petition are disingenuous.

Respondents assert that Petitioners' showing that *all* 34 children automatically transferred under the Illinois Juvenile Court Act are African-American and the evidence establishing that Chicago public housing projects are racially segregated "prove nothing in this case." (Opp. Br. p. 6). In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Court ruled that less statistically significant evidence could be sufficient to establish a claim of intentional racial discrimination. At the very least, such evidence makes suspect the hypothesis that race was not a factor in the decision making process. *Id.* at 309 n.4.

Moreover, this Court has held that the racial composition of Chicago public housing is not the result of racially neutral demographic phenomena. It is the direct result of invidious and *unremedied* racial segregation carried out by the government actors in violation of the Fifth and Fourteenth Amendments to the Constitution. *See Hill v. Gautreaux*, 425 U.S. 284 (1976). Moreover, the Chicago Housing Authority ("CHA") carried out its invidious discrimination under authority granted it by the General Assembly, and the General Assembly delegated its responsibility to assure that race was not a factor in the sites selected by CHA to the Chicago City Council. *Gautreaux v. CHA*, 296 F. Supp. 907, 909-10 (N.D. Ill. 1969).

In light of the State of Illinois' passive involvement in, if not tacit approval of, the deliberate racial segregation of CHA housing projects, Respondents cannot be heard to claim the General Assembly was unaware that "public housing" means "Black neighborhood" in Illinois. The General Assembly knew of the racially discriminatory effects of the Juvenile Transfer Act and intended those consequences to be visited on African-American children. This is particularly true given the fact that the General Assembly was put on notice of this inevitable discrimination by members of its own body.[1]

Under these circumstances, Respondents should be constitutionally obligated to present evidence affirmatively demonstrating race was not a factor in the decision. *Cf. Personnel Adm'r. v. Feeney*, 442 U.S. 256, 279 nn.24 & 25 (1979) (where statutory history and available evidence affirmatively demonstrated unlawful amicus was not a factor, the inference drawn from the inevitable consequences of the action failed to ripen into proof of unlawful intent). Here, of course, Respondents point to *no* evidence admitted below affirmatively demonstrating race was not a factor. Accordingly, the inference drawn from the proof of prior discrimination, contemporary statements made by members of the decision making body, and the inevitable discriminatory effects of the statutes ripened into proof of

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1 *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (contemporary statements made by members of the decision making body may be highly relevant to the question of intent).

an intent to discriminate. *See, e.g., Hazelwood*, 433 U.S. at 309; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, _____ U.S. _____, 113 S. Ct. 2217, 2228 (1993).

Respondents contend Petitioners' evidence is flawed because it does not include whether any white children have been charged with narcotics offenses in delinquency petitions. (Opp. Br. pp. 7-8). Whether any white children were afforded the procedural protections of the Juvenile Court Act is *irrelevant* to the question of whether any white children were *automatically* tried as adults under the Juvenile Transfer Act. Respondents, of course, have not presented a *single* instance of a white child who was automatically tried as an adult and subjected to enhanced penalties under the Act. To the extent such evidence exists, it is in *Respondents'* possession and Respondents certainly would have brought it to the attention of the courts below. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).[2]

The simple fact is that the law does not apply to a white child in Bridgeport because the government deliberately and invidiously segregated CHA housing. *Gautreaux*, 296 F. Supp. 907. As a result of deliberate government discrimination, the term "public housing," at least in Illinois and particularly with regard to the CHA, is a "code word" for African Americans and is, as found by the trial court, a *de facto* racial classification. The only foreseeable and, indeed, inevitable consequence of this Act is that African-American children will be tried and condemned to adult sentences while similarly situated white children will continue to enjoy the full protections of the Juvenile Court Act, guaranteeing them the right to services necessary to their proper development and age appropriate punishments. This *de jure* separate and *unequal* treatment of children on the basis of race was outlawed in *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court should grant this petition if for no other reason

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2 Respondents also argue that the Act is aimed only at the place of the alleged crime and not to the residence of the alleged offender. As proof, it contends that Petitioner White lived *one-half block* from the scene of the alleged crime and Petitioner Lawrence lived within a short walking distance. (Opp. Br. p. 10 n.3). It is uncontroverted, however, that the alleged crimes occurred within the public housing projects in which Petitioners resided.

than to remind the State of Illinois that *Brown*, not *Plessy v. Ferguson*, 163 U.S. 537 (1896), is the law of the land.

Moreover, Respondents do not challenge Petitioners' showing that the courts have applied different standards of review to cases involving *de facto* racial classifications in enhanced penalty cases. As set forth in Petitioners' Opening Brief, a Minnesota court applied a heightened level of scrutiny in holding that a Minnesota statute that created enhanced penalties for possession of crack but not powdered cocaine violated the Fourteenth Amendment's guarantee of equal protection. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Illinois, on the other hand, erroneously applied the rational basis test.

While Petitioners respectfully suggest that strict scrutiny is the proper standard, at the very minimum, heightened scrutiny is required in cases where the racially discriminatory effects of legislation are both obvious and inevitable. This is particularly true in an era when even the most unsophisticated decision making body can and will hide improper motives. *See* Etienne Balibar, "Class Racism" in *Race, Nation, Class* 204, 319 (1991).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 10, 1994

APPENDIX A

REPORTS AND PROPOSALS

SENTENCING COMMISSION'S SYMPOSIUM ON DRUGS AND VIOLENCE PUTS EMPHASIS ON PREVENTION*

[53 CrL 1265]

Many speakers call for elimination of federal mandatory minimum sentences.

Although the U.S. Sentencing Commission's work is regularly denounced as "draconian" by members of the criminal defense bar and a vocal minority of the federal judiciary, Commission Chairman William W. Wilkins and others speaking at a three-day symposium last week on "Drugs and Violence in America" put forward a markedly different view of what's right and wrong with federal sentencing. Federal mandatory minimum sentences for drug crimes were criticized by many speakers, on the grounds that they "skew" the federal Sentencing Guidelines' multi-factored approach to sentencing, do not have the deterrent effect on crime Congress evidently intended, and are causing prison officials to prematurely release violent criminals to maintain a supply of beds for drug offenders. Broadly speaking, the consensus of the invited speakers was that the federal government's drug control effort should move away from punishment and interdiction, and toward prevention. Increased spending on jobs programs, Head Start, and drug treatment were urged; the argument for decriminalization of drugs was also presented.

The symposium, sponsored by the Sentencing Commission, brought together officials from all parts of the federal criminal justice establishment—judges, prosecutors, defense counsel, law enforcement, probations officers, prison administrators, educators and the research community. It was held in Washington, D.C., June 16-18.

During the opening session, Wilkins told the gathering that the commission has identified "crime control" as its main objective. To reach this goal, the choice before the nation is not between either a "hard" or a "soft" approach. Rather, Wilkins said, the country must

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* Actual page numbers are referenced by [n].

focus on the causes of crime, and solve those problems in a humane fashion. Wilkins spoke of the need for new attitudes about guns and for a re-examination of the federal government's approach to crime.

FEDERAL-STATE PARTNERSHIP

Attorney General Janet Reno, delivering the symposium's keynote address, said the first order of business is to reduce the political rhetoric surrounding drug and crime issues and create a partnership between state and federal officials. By working together, "we can make a difference with respect to crime, drugs and violence in America," she said.

The federal government needs to move away from the past practice of dictating solutions to the state and local governments but not providing the resources needed to implement them, Reno said. She exhorted state and federal prosecutors' organizations to get together and adopt a "rational policy as to what should be charged in federal and state court."

Rather than making charging decisions on the basis of the amount of prison time a conviction in federal court could bring, prosecutors should look instead to availability of prison resources. "The American people are fed up with the get-tough sentences if there are not enough prisons beds to implement them," she said. She called on federal prosecutors and politicians to be frank with the people. In many places criminals do not serve their entire sentence, or even a large part of it, she noted.

Drawing on her personal experience in Florida's criminal justice system, Reno said that defendants in that state serve only 20-30 percent of the sentence imposed. Dangerous prisoners are being let out "sooner rather than later," because of federal ceilings, she said. And, whatever amount of time is served, inmates are simply returned to the street. "It makes no sense to put drug defendants back onto the street—there's no backstop, or fallback, for them. They go back to their old habits," she said. "It's a stupid expenditure of taxpayer dollars."

Reno called for a transitional program "so offenders can get off on the right foot." Any such program should include alternative

housing sites so drug offenders don't [53 CrL 1266] go back into the environment that created the problem. Also needed is job training and placement, she said.

The country also needs to look at family and domestic violence, Reno continued. She recounted a study conducted in Dade County, Fla., which indicated that 40 percent of the county's homicides came about as the result of domestic violence. This tragedy spills over into the next generation. "Children who see violence in the home come to accept violence."

Where will the money come from? Reno told the gathering (of mostly federal officials) that there will not be a lot of money to spend on new federal initiatives. Thus, government's task will be to evaluate how funding is currently spent and focus resources on programs that are working. Presently, there are 37 agencies dealing with drug enforcement, she noted. Savings could be realized by addressing this inefficiency.

FOCUS ON CHILDREN

The focus of the federal government's effort must be on juveniles, Reno said. "It's too late to wait until they are 12-13 years old. By that time they've already fallen behind in school, they can't read up to grade level, their academic performance is poor, so they're acting out to get attention in other ways." Reno declared that the "root cause" of the country's social ills is that "for the last 30 years we've forgotten and neglected our children."

"I'll never be able to build enough prisons unless the children are reached," she said. This was the message that Reno exhorted the symposium attendees to send their friends, neighbors, and elected representatives. Unless business leaders step forward, "crime will be so bad they won't be able to do business." Unless the needs of the country's juveniles are addressed, "pensions won't be worth the paper they're written on."

The solution must be built around "balanced punishment and prevention," Reno said. "No one has ever successfully raised a child on punishment alone." On the subject of prevention, she cited a

statistic: for every $1 spent on prenatal care, $3 is saved during the next 3-4 years of the child's life.

"We need to make early investments in children," Reno continued. How? Her solution was an initiative she called "A National Agenda For Children." The agenda would be implemented by a partnership between federal and state governments. Communities will identify the problem; then state and federal government will step in to fund and implement the solutions proposed by the communities. Reno identified four principal components that she said were vital to the success of the initiative:

- *Teenage pregnancies.* Something must be done about teen pregnancies, Reno said. In addition to working with young women, government efforts must also be directed to young fathers. New programs must be developed for high school students.
- *Start with the very young.* Government efforts need to be focused on children from birth to age three. Fifty percent of all learned human responses are learned during the first year, Reno said. The concept of punishment and reward is learned during the first three years. Unless this elemental human response is developed in children, no amount of later punishment for crime will be effective.
- *Conflict resolution programs.* Beginning in the elementary schools, children need to un-learn violence as a means of settling disputes.
- *Curb television violence.* Television advertisers need to be told not to feature violence in commercials aired at times when young children are watching. Reno complained that the federal government is not doing enough for children after school hours, when many simply watch television or roam the streets. She suggested that money now spent on prisons be used for family-oriented programs, or to occupy children during after-school hours. "We need to focus on "rebuilding the family around the child," she said.
- *Early aptitude and interest testing.* Students should be tested in seventh grade, then steered into summer jobs that provide

valuable, necessary skills—not make-work. The government should create opportunities for public service jobs for youth.

In closing, Reno recalled the image of the Peace Corps. "Our challenge is on the streets of America today," she said. "If we give our children half a fighting chance to make it, they will."

A DEMAND-SIDE STRATEGY

Among the more provocative panel discussions to be heard during the symposium was "Approaches to the Problems of Drugs and Violence," which featured Baltimore Mayor Kurt L. Schmoke's well-publicized call for decriminalization of drugs and comments from Mathea Falco, author of "The Making of a Drug-Free America."

The federal government's pursuit of a supply-side strategy to the drug problem has been a failure, Falco said. This failure provides an opportunity to consider a demand-side strategy—one that focuses on education and treatment. "People can learn not to use drugs," Falco said. As an example, she cited the country's experience with a formerly popular addictive substance, tobacco. Despite the fact that tobacco is legal and highly advertised, tobacco use has steadily decreased. And, among people who are concerned about their health, marijuana and cocaine use are also on the decline, Falco said.

"Sustained, rigorous" drug treatment works, she said. Falco claimed that three out of four individuals can quit taking drugs if they have treatment. Returning again to tobacco, Falco said that the average successful quitter of cigarette smoking relapsed four times before quitting for good. Society, and the criminal justice system, unwisely holds addicts of other drugs to a much higher standard, she said. Because many drug addicts eventually come under the control of the criminal justice system, there exists a tremendous opportunity to help these individuals. There are many effective treatment programs in existence, yet the federal government is doing "virtually nothing," she said. Falco exhorted the federal government to stop measuring success in the so-called drug war by the number of arrests and drug seizures, and to start measuring success by the number of addicts treated and cured.

Like Falco, Schmoke took as his starting point the asserted failure of the standard approach—police, prosecution, and jail—to the drug problem. What is needed, he said, is a new approach based on "realism, public health and national service." Schmoke agreed with **[53 Crl 1267]** Reno that federal mandatory minimum sentences should be eliminated. Second, the government's current emphasis on punishment as opposed to treatment should be reversed. Schmoke recommended that 70 percent of available resources should be spent on treatment, and the remaining 30 percent on law enforcement. "We are being good soldiers in the war on drugs, but we are not winning," he maintained.

"Decriminalization" means fighting the war on drugs with a public health strategy, Schmoke explained. Law enforcement remains important, but drug addiction is "a problem for doctors to treat, not for police to prosecute." Under a decriminalization strategy, the government would control the distribution of now-banned drugs just as it does with any other prescription drug. By adopting this approach, the government would take the profit out of street-level drug dealing, which is the main source of drug-related violence. The police could then focus on the major drug dealers. The current manner in which the "drug war" is being conducted is demoralizing and is making criminals of African-Americans, Schmoke said. He reminded the audience of the nation's experience with alcohol prohibition and suggested that experience counsels in favor of drug decriminalization. "The current approach is a national disaster, and it will not bring peace to our streets," Schmoke said.

Responding to Schmoke's remarks, Reuben M. Greenberg, Chief of Police in Charleston, S.C., raised a number of points that he said have not been adequately considered by drug decriminalization advocates. Greenberg mentioned a study indicating that legalization will bring about a 20-30 percent increase in drug use. The problem of "cocaine babies" will remain, as will the problem of keeping powerful drugs out of the hands of teenagers and younger children. Also, Greenberg stated, decriminalization advocates have not articulated what should be done when it is finally time to tell the drug user to stop. Finally, proponents of drug decriminalization assume that drug addiction is the main cause of crime and violence. In many cases, he said, drug addicts are "criminals first, drug users second."

Joseph D. McNamara, a research fellow with the Hoover Institution and former chief of police in San Jose, Calif., spoke of the need for the government to move away from its current hard-line approach to drug and crime control. Drug arrests are futile, he said. Neither will gun control work "in the absence of a change in the value system of young people."

The "drug war" has become a "race war," McNamara asserted. African Americans are arrested at 4-5 times the rate of whites, yet some studies show that whites account for 80 percent of all illegal drug use. The current criminal approach, typified by "in the face confrontations," has evolved into a major assault on the African American community, McNamara said. Indeed, the police, as combatants in the "war on drugs" are starting to treat people as the enemy, he charged.

McNamara called for an end to the hostilities and offered a number of steps he said would be more productive. First, funding now directed to building prisons should be made available for neighborhood groups and youth programs. Second, the government's anti-drug efforts should emphasize treatment and prevention. Police, he said, "should be partners in the community, and not drug war soldiers." Neighborhoods should have the right to declare themselves "drug-free zones." Finally, non-violent conflict resolution methods should be taught in the elementary schools.

NO GRAVER PROBLEM

The symposium's final session was highlighted by a luncheon address delivered by Chief Justice William H. Rehnquist.

During remarks introducing Rehnquist, Wilkins availed himself of the opportunity to speak one more time on the subject of mandatory minimum sentences. The mandatory minimum approach to sentencing is neither the fairest nor the most efficient means of operating a sentencing scheme that has crime control as its objective, he said. An ideal sentencing scheme would be tough "some of the time" and fair "all of the time," Wilkins said. It would eliminate disparity among similarly situated individuals convicted of similar crimes, and it would impose a sentence proportionate to the offense. Finally, an ideal sentencing scheme would have a high degree of

certainty. A mandatory minimum sentencing scheme achieves only one of these five objectives—it is tough—and neglects the others, Wilkins charged.

Rehnquist's remarks would later echo Wilkins' criticism of Congress' current approach to federal drug sentencing, but he began by declaring that the judiciary has a "limited perspective" on the issue and that the course of the nation's so-called war on drugs "ultimately raises policy questions that are best solved by popular opinion." Judges have no unique perspective, he said. Nevertheless, Rehnquist offered his personal view that there is "no graver national problem" than the plague of drugs and violence. Matters of the budget deficit and the balance of trade do not have the same sense of urgency, he said.

Rehnquist recounted recent history, during which more federal drug crimes have been created and more torial authority has been blurred, with formerly state "street crimes" now ending up in federal court. "One consequence of these efforts has been the near transformation of some federal courts into what might be called national narcotics courts," Rehnquist said. Briefly, the Chief Justice recounted the toll that federalization of crime, especially drug crime, has taken on the federal judicial system. During the years from 1980-90, the number of criminal cases has risen 60 percent. Drug prosecutions rose 200 percent. Drug cases are more time-consuming than other judicial business. While 25 percent of the federal caseload is drug crime, these cases occupy 48 percent of a federal judge's total time.

The 1984 Sentencing Reform Act, which underlies the Sentencing Guidelines, has had a profound effect on the federal courts, Rehnquist continued. Sentencing appeals which were non-existent before the act, now are commonplace. Sentencing hearings, which were once brief affairs, now can take an hour or more to conduct. Sentencing reports are necessarily more complex. Probationary sentences have decreased, but sentences with a "supervised release" component have doubled in the last three years. Panel defense attorneys with appointments under the Criminal Justice Act find that they now need to devote a great deal of time to the federal Sentencing Guidelines. **[53 Crl 1268]**

Speaking as the representative of the federal judiciary, Rehnquist turned to the subject of judicial reaction to current federal

drug sentencing and the federalization of other crimes. While a small number of judges may long for the halcyon days of unfettered discretion, "a respectable body of opinion" focuses its criticism on federal mandatory minimum sentences and not on the sentencing guidelines, he said. "There is almost no likelihood that congress will go back to the days of pre-guidelines sentencing," Rehnquist said. "The guidelines will be with us for the foreseeable future." Rehnquist complained that mandatory minimum sentencing statutes are often the result of last-minute floor amendments, tacked on to other measures by politicians who want to appear tough on crime.

A majority of the federal judges oppose the current approach to drug sentencing, which is based principally on their objections to federal mandatory minimum sentencing statutes, Rehnquist said. These judges view mandatory minimums to be unduly harsh on the drug "mules" who merely ferry drugs from one location to another. Second, mandatory minimums vest too much discretion in prosecutors. Third, they skew the sentencing guidelines by requiring a minimum prison term without regard to any other relevant sentencing factor. Fourth, mandatory minimums have caused federal prison populations to balloon in recent years.

The call for more federal crimes has become "a veritable siren song" for Congress, Rehnquist charged. In this regard, Rehnquist suggested that Congress had perhaps overestimated the need for new federal crimes, and he expressed the hope that a principled basis could be found for a jurisprudence for determining what should and should not be a federal crime. The Chief Justice noted that Attorney General Reno has pledged to re-examine the Department of Justice's approach to determining which crimes should be prosecuted in federal court. He also cited recent statements made by some influential members of Congress which indicated a similar desire to re-examine the issue of federal mandatory minimum sentences. If changes are to be made, Rehnquist said, the federal judiciary should be consulted by Congress beforehand.

Nevertheless, "alternatives cannot and should not be committed to judges, lawyers, and experts," Rehnquist declared. "The ultimate questions should be decided by the representatives of the people."

APPENDIX B

THE ILLINOIS SUPREME COURT SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE

FINAL REPORT*
Part II

December 1993

Jerold S. Solovy, Chairman

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* Only Chapter VI of this report is copied herein.

VI. AUTOMATIC AND DISCRETIONARY TRANSFER, AND APPEALABILITY OF DISCRETIONARY TRANSFER ORDERS [60]*

Introduction

Spiraling crime, resultant public fear, and diminishing government and private treatment resources have led to the virtual abandonment of rehabilitation as a goal of our adult criminal system. Increased involvement of juveniles in violent crime has recently received a blitz of national and local media coverage. This increased scrutiny is often coupled with public outrage over a juvenile court system which is perceived as failing to hold juveniles accountable for their actions. As a result, the rehabilitative model — the very foundation of the juvenile court system — is crumbling.

Dissatisfaction with the juvenile court system traditionally has been met by legislators, members of the law enforcement community and the public with increased efforts to transfer juveniles from juvenile court into the adult criminal system. In Illinois, each new legislative session generates new bills designed to expand the number of offenses for which a juvenile may be automatically tried as an adult.[89]

Most recently, the United States Congress has entered the fray. Illinois Senator Carol Moseley-Braun recently introduced an amendment to the Senate's comprehensive crime bill. Her amendment would authorize United States attorneys to prosecute, as adults, juveniles age 13 or older who are charged with murder, attempted murder, armed robbery with a gun, aggravated battery or aggravated

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* Actual page numbers are referenced by [n]

89 Two such bills are currently being debated in the Illinois General Assembly's House Subcommittee on Juvenile Justice. House Bill 54 seeks to amend the Juvenile Court Act to provide for transfer to adult criminal prosecution of a minor at least 15 years of age who commits certain weapons violations on school grounds. House Bill 123 seeks to add the crime of aggravated battery with a firearm or aggravated discharge of a firearm to the list of offenses for which a minor may be automatically transferred.

assault with a gun, [61] and drive-by shootings.[90] The amendment passed the Senate by a sixty-four to twenty-three vote margin.

Clearly, transfer laws have been, and remain today, a popular and expedient approach to the problem of juvenile crime. It is not clear, however, that transfer has been an effective response to juvenile crime. Increased use of transfer, for instance, does not appear to have resulted in a reduction of juvenile violence. In fact, there has been an increase in the number of violent crimes committed by juveniles during the era of increased transfer.[91] Moreover, as one study recently noted, "juveniles tried in adult courts do not always end up being held more accountable than they would have been in juvenile court, and they often are exposed to physical and sexual assaults that would not have occurred in juvenile institutions."[92]

The increased use of transfer has also produced unintended negative consequences. One such unintended consequence is that transfer has had an overwhelmingly disproportionate impact upon African-Americans and other minorities.[93] [62]

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90 Moseley Braun Bill Would Try Some 13 Year Olds As Adults, Chi. Trib., Oct. 27, 1993, § 1 at 7.

91 A survey conducted by the Office of Juvenile Justice Prevention found that the per capita rate of violent offense cases increased 18% from 1985 to 1989. This finding was based upon a national survey of 10 selected jurisdictions. Despite this overall increase in violent crime, violent crimes comprise only about 8% of all juvenile crime. Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, Juvenile Justice Bulletin (Apr. 1993).

92 National Coalition of State Juvenile Justice Advisory Groups, Myths and Realities: Meeting the Challenge of Serious, Violent, and Chronic Juvenile Offenders: The Eighth Report to the President, the Congress, and the Administrator of the Office of Juvenile Justice and Delinquency Prevention (Fall 1992) [hereinafter Report of Juvenile Justice Advisory Groups].

93 Data gathered by the Cook County Public Defender's Office during 1992-1993 indicate that approximately 95% of juveniles subject to discretionary transfer during that period were African-American. This research was conducted by Kendall Hill, Assistant Public Defender, Cook County Public Defender's Office. See also Report of Juvenile

Before we blindly continue down the path to the increased use of transfer, we should pause and reflect on the successes and failures of the transfer strategy. ***The Illinois Supreme Court, for example, should recommend that the Illinois Generally Assembly study whether the goals of transfer laws have been met and what, if any, unintended consequences of transfer have emerged. Such a study should be informed by the experience of juvenile and criminal court judges, prosecutors, defenders, probation officers, correctional officials, and other court personnel who have acquired special knowledge of the systemic impact of transfer.*** The collective voice of these practitioners has, to date, been largely ignored.

Automatic and Discretionary Transfer

During the last ten years, an increasing number of juveniles have been transferred to adult court.[94] The increase in the number of juveniles tried as adults has been the result of a number of factors. First, as previously discussed, there has been an increase in the number of serious, violent offenses committed by juveniles. Second, the General Assembly has expanded the number of offenses for which transfer is required.[95] Third, prosecutors may be electing to

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Justice Advisory Groups, supra, at 33; America's Children at Risk, supra. Between 1987 and 1991, the proportion of confined juveniles who were children of color rose from 53% to 63%, with the largest increase among African-Americans (37% to 44%) and Latinos (13% to 17%).

94 In Cook County during the last 10 years, a total of 2,555 juveniles were transferred to adult court. Discretionary transfers accounted for 522 of these cases. There were 2,033 automatic transfers. The percentage breakdown by offense was as follows: armed robbery 35%; sex offenses 15%; murders 29%; drug/weapons near school or public housing 20%. This research was conducted by the Children and Family Justice Center of the Northwestern University School of Law in the Spring of 1993.

95 The General Assembly has increased the categories for which transfer is mandated to include non-violent crimes, requiring that juveniles found with guns or drugs in or near public housing or schools must be transferred. See 705 ILCS 405/5-4(6)(a), (7)(a).

try more juveniles as adults both in the discretionary and automatic categories through charging decisions. Thus, the increase in the number of juveniles tried as adults reflects changes in the composition of the population committing serious crimes as well as political and law enforcement strategies for addressing the problem of crime committed by young people. [63]

It appears that the criminal court system has not been a significant player in policy decisions regarding the determination of how many juveniles should be tried as adults. Nevertheless, the impact of this policy — the increasing number of youth under the age of 16 in adult court — is felt directly by criminal courts. It is in the criminal courts that decisions are made resulting in the prolonged incarceration of young people in state penitentiaries. Criminal courts practitioners also have some sense of whether there are adequate sentencing alternatives for young people transferred or initially prosecuted under automatic transfer laws. The observations of judges and criminal courts practitioners concerning the increased use of transfer could be invaluable to legislators.

The increasing use of transfer also has had an impact upon our juvenile courts. On the one hand, the need to make discretionary transfer decisions ties up substantial judicial and detention resources in juvenile court (at least in Cook County).[96] On the other hand, the increased use of transfer to adult court implies that juvenile courts are unable effectively to address the problem of serious juvenile crime.[97] Again, the question of what kinds of cases juvenile courts

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96 The population of the Cook County Juvenile Detention Center on November 5, 1993 was 651, approximately 160 over capacity. Approximately one-third of the population remains in the Detention Center for prolonged periods because of discretionary and automatic transfer policies. This overcrowding means that approximately 200 children are not in school because it cannot enroll all of the juveniles currently housed in the detention center.

97 However, there is considerable evidence that recidivism rates for juveniles released from juvenile institutions are far lower than such rates applicable to those released from adult institutions. See Report of the National Coalition of State Juvenile Justice Advocacy Groups, supra, at 35. See also The testimony of Charles Fasano of the John

should be handling is a legislative decision. However, decision-making regarding the juvenile court's jurisdiction should be informed by the experience of juvenile court judges, prosecutors, defenders, and state correctional officials. The move to increase the number of [64] children tried as adults has been a political response, rather than a well-reasoned campaign to address the limitations of our juvenile courts and correctional institutions.

As discussed earlier, there is considerable evidence that one unintended consequence of the increased use of discretionary and mandatory transfer is that it disproportionately impacts minorities.[98] If it is true that we disproportionately send our minority youth to adult court and to adult correctional facilities, the court should recommend an investigation into the reasons for this and, if necessary, take steps to redress the problem.

To date, there has not been a cost-benefit analysis of the policy which results in the increasing use of adult court and adult correctional facilities to deal with the problem of juvenile crime. ***Because of the impact that the increasing use of transfer has upon courts and corrections, the Illinois Supreme Court should recommend that the Illinois General Assembly study current transfer practices to determine whether we are on the right track in dealing with serious crimes committed by juveniles. Such a study should include an examination of the population affected by discretionary and mandatory transfer, prosecutorial decision-making regarding the use of transfer, the impact of transfer upon the juvenile and adult court systems, the impact of transfer on correctional resources, whether the policy deters or lessens crime, and whether there are other alternatives which would be less costly to the justice and correctional systems and more beneficial to our communities and to our young people.***

The increasing use of discretionary and automatic transfer of juveniles from the juvenile to the adult criminal jurisdiction has consequences that have not been fully explored. These consequences

Howard Association in In re S.M. No. 92 12006 (Juv. Ct. of Cook Cty. Sept. 30, 1993) also discusses this evidence.

98 See supra note 93.

include, among others, increasing the numbers of young offenders utilizing the resources of the criminal system, increasing the number of young people being incarcerated in adult penal institutions, a possible discriminatory effect as far as the racial composition of the [65] transferred population is concerned, and the short and long-term effects of treating juveniles as adults within our court and correctional systems. ***The Illinois Supreme Court should appoint a Committee to study the question of whether the increasing use of transfer is achieving its intended results and what, if any, unintended consequences have been manifested.***

More specifically, the Committee should investigate the following questions:

1. ***Do juveniles transferred to adult court receive harsher penalties than they would receive in juvenile court? Are juveniles being held more accountable for their actions because of the transfer?***

2. ***Are adult probation services geared to providing services to young offenders?***

3. ***Are the resources of the criminal courts sufficient to manage increasing numbers of young offenders?***

In addition, the Illinois Supreme Court should consider recommending legislation that would:

1. ***Permit determinate sentencing to the Juvenile Division of the Department of Corrections for certain serious felonies as an alternative to transfer to adult court. (This would decrease pressure to transfer juveniles to the adult system);***

2. ***Permit "waiver back" to juvenile court in appropriate circumstances of juveniles who are sentenced as adults but who are found to be amenable to treatment;***

3. ***Reduce or eliminate mandatory minimum sentences for juveniles convicted in adult court in order to tailor sentences of young offenders to the needs of youth committed to the Department of Corrections;***

4. ***As an alternative to transfer, permit a juvenile court judge, after a hearing to extend juvenile court jurisdiction beyond the age of twenty-one (but not beyond age [66] twenty-five) for minors charged with violent offenses who are not ready to be released back into the community at age twenty-one.***[99]

5. ***Increase the resources of the Juvenile Division of the Department of Corrections to meet the demands that will be made upon it if proposals 1-4 above are implemented.***

The foregoing recommendations are consistent with the recommendation of the American Bar Association's Presidential Working Group on the Unmet Legal Needs of Children and Their Families. Its report advocates U.S. Department of Justice support for the development of model programs to reduce the number of juveniles transferred to adult courts.[100]

Appealability of Discretionary Transfer Orders

At present, there is an inequity in Illinois law regarding the transfer of minors from the juvenile court to the adult court. The State is permitted to appeal a juvenile court judge's decision not to transfer a juvenile, but a juvenile cannot appeal an adverse transfer decision until after he or she is convicted in adult court. This imbalance has profound consequences for juveniles. It encourages abuses of prosecutorial discretion in the decision to file appeals, results in prolonged periods of pretrial detention of minors, and deprives minors of the rehabilitative services of the Juvenile Court. There is simply no compelling reason why both the State and the

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99 In his article, The Delinquent and the Juvenile Court: Is there Still a Place for Rehabilitation?, 25 Conn. L. Rev. 57 (1992), the Honorable Gordon A. Martin, Associate Justice of the Massachusetts Trial Court and past chair of the Juvenile Law Committee of the National Council of Juvenile and Family Court Judges, advocates forcefully for extended commitment statutes as an alternative to increased reliance on transfer and discusses legislative efforts in this direction in both Massachusetts and California.

100 America's Children at Risk, supra, at 65.

juvenile should not be entitled to an interlocutory appeal. The Supreme Court should use its rulemaking power to remedy this imbalance. [67]

In 1969, the Illinois Supreme Court, in People v. Jiles, 43 Ill. 2d 145, 251 N.E.2d 529, was asked to use its rulemaking power to adopt a rule which would permit interlocutory appeals from transfer orders. The Court declined to adopt such a rule, holding that a juvenile did not have the right to an interlocutory appeal of an adverse transfer decision because:

> to permit interlocutory review of such an order would obviously delay the prosecution of any proceeding in either the juvenile or the criminal division, with the result that the prospect of a just disposition would be jeopardized ... To permit interlocutory review would subordinate that primary issue [innocence or guilt] and defer its consideration while the question of punishment appropriate for a suspect whose guilt has not yet been ascertained is being litigated in the reviewing courts.[101]

Eight years later, however, in People v. Martin, 67 Ill. 2d 462, 367 N.E.2d 1329 (1977), the Illinois Supreme Court held that the State has the right to appeal an adverse decision in a transfer case. The Court, noting that the State, unlike a juvenile, could not appeal an order denying transfer at the conclusion of the proceedings, held that the trial court's decision "ought not to be totally immunized from review."[102] This is a good reason to permit the State to have an interlocutory appeal, but it is not a reason why the minor should not be permitted one as well.

This lack of reciprocity has profound consequences. When the State appeals a juvenile court's decision not to transfer, the minor may ultimately spend in excess of two years waiting for the appeal to conclude. Even though defense attorneys routinely request that these cases be placed on the appellate court's accelerated docket,

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101 Jiles, 433 Ill. 2d at 150, 251 N.E.2d at 531.

102 Martin, 67 Ill. 2d at 466, 367 N.E.2d at 1331.

delays in preparing the record on appeal — juvenile court reporters routinely take eight to ten months to prepare transcripts — coupled with extensions in the briefing schedule and delays in the decision-making process generally result in two years passing from the time the State files its notice of appeal. Although [68] minors against whom an interlocutory appeal has been filed are eligible for bail, these minors and their parents often cannot afford to post the bond necessary to secure release. Thus, juveniles may be detained for more than two years before their adjudicatory hearing, after which they may be acquitted. Two years is a long period of time in anyone's life but seems like an eternity to many of the minors in custody whose lives are hanging in the balance.

During this entire time, these minors do not receive the benefit of the full range of the rehabilitative services of the juvenile court. Those in custody receive only the limited services offered by the Juvenile Temporary Detention Center, and those out of custody receive no services at all from the Probation Department. To make matters worse, the time that these minors spend waiting for the decision of the appellate court is not credited as time served toward any sentences they may receive if convicted under the Juvenile Court Act and sentenced to the Juvenile Division of the Department of Corrections.

The standard of review on an appeal of a decision to transfer is the abuse of discretion standard. Judges are given a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the ultimate transfer decision.[103] There is no precise mathematical formula for the weighing of the statutory factors; the court need only consider each of the factors and no one single factor is determinative.[104] This standard of review has made it extremely difficult for the State to win its appeals. During the past ten years, only two opinions — one published and one

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103 People v. Liggett, 90 Ill. App. 3d 663, 413 N.E.2d 534, 537 (4th Dist. 1980).

104 See, e.g., People v. Newell, 135 Ill. App. 3d 417, 481 N.E.2d 1238, 1242 (1st Dist. 1985); People v. Cater, 78 Ill. App. 3d 983, 398 N.E.2d 28 (3d Dist. 1979).

unpublished — have been issued reversing the juvenile court judge's decision not to transfer. Yet, the State has repeatedly used its discretion to appeal adverse transfer decisions. [69]

Affording only the State an interlocutory appeal of transfer decisions creates a situation that is ripe for abuse of prosecutorial discretion. Because many juveniles cannot afford to make bail, there is little downside for the State to appeal adverse transfer decisions. In fact, there is every incentive to appeal because appealing transfer decisions enables the State to keep a juvenile in custody for lengthy periods of time pending resolution of the appeal. In addition, the State can and has used its right of appeal as a bargaining chip in plea negotiations. Faced with the prospect of having to wait years in custody for a decision, even an innocent juvenile may be tempted to take a plea as long as it keeps him or her in juvenile court.

The current lack of reciprocity also allows the State substantial control over how the law regarding transfer in Illinois is developed. The State gets to pick and choose which cases it will appeal and which issues it will raise on appeal. A minor cannot raise any issues regarding the transfer decision until after the minor is tried, convicted and sentenced in adult court. There is no mechanism prior to the minor's conviction in adult court whereby the minor can challenge improper evidentiary rulings by the juvenile court judge, improper interpretations of the transfer statutes, and violations of the minor's constitutional rights.

Although these issues and others can be raised after conviction in the adult court, because of delays in our criminal and appellate courts, many of these juveniles will reach the age of majority by the time they are permitted the right to appeal the juvenile court's decision is redress procedural deficiencies in the transfer decision. Even if an appellate court did reverse a conviction and remand to juvenile court for a new transfer hearing — to date, not a single Illinois court has done so — the information regarding the minor from the original transfer hearing would be outdated. In the few cases in which juveniles were improperly waived, appellate court have responded with one of three remedies: 1) retrial of the juvenile in [70] criminal court; 2) reconstruction of the transfer hearing; or 3)

release of the juvenile.[105] Each of these solutions is problematic. Allowing the State to re-indict the juvenile who is now past the maximum age of juvenile court jurisdiction and to retry him in criminal court is fundamentally unfair to the juvenile and hardly remedies the situation. The simple fact is that the juvenile might never have been required to stand trial on criminal charges if he had been given a defect-free transfer hearing. The juvenile should not be forced to forego the substantial benefits of the juvenile system because of the error of the State or the judge. Outright release of the juvenile, especially in cases where a particularly heinous crime has been committed, may vindicate the juvenile's rights at the expense of protecting the public.

The reconstructed transfer hearing is also of dubious value. The purpose of the reconstructed hearing is to determine if a hearing free from error would have resulted in transfer. The judge in such a hearing must not only attempt to imagine the juvenile as he or she was at the time of the original transfer hearing but must also look forward from the initial proceeding to determine, if at the time of the transfer hearing, the juvenile was amenable to the rehabilitation-oriented treatment offered by the juvenile system. In order to be fair to the juvenile, the judge must put aside his knowledge of the juvenile's subsequent development and present condition and all intervening circumstances concerning the juvenile. This already difficult decision becomes nearly impossible as the reconstructed hearing becomes further removed in time from the original hearing.

An expedited interlocutory review process would assure that, if warranted, reconsideration by the juvenile court would be made while these juveniles were still underage. Such a procedure would also avoid the need for an appellate court, faced with a juvenile convicted in most instances of a violent crime, to have to choose one of the three unappealing [71] and unsatisfactory remedies for the improperly waived juvenile. More importantly, however, juveniles would be spared the burden and public scrutiny associated with a

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105 Note, Review of Improper Juvenile Transfer Hearings, 60 Va. L. Rev. 817, 820 (1974).

criminal trial as well as the stigma associated with being branded a "criminal."

Finally, in declining to exercise its rule-making power in Jiles, the Supreme Court stated that "there is no discernible pattern in the procedures of the various States as to the reviewability of such orders, and because the matter depends so largely upon the varying provisions of the applicable statutes, nothing is to be gained by a detailed analysis of the authorities from other jurisdictions."[106] In the twenty-four years since Jiles, a discernible pattern has emerged in the various states both as to the reviewability of transfer orders and the various transfer statutes. The great majority of states allow a juvenile to seek review of a waiver decision prior to being convicted in criminal court. Most of these states have specifically stated that a juvenile court's waiver of jurisdiction is a "final order" for purposes of appeal. Some states have deemed the orders interlocutory but appealable as of right, and yet other states have deemed the order interlocutory but allow juveniles leave to appeal through permissive or discretionary appeals. Although a sizeable number of states have held that juveniles may not appeal adverse transfer orders until after conviction in criminal court, it appears that only two states, Massachusetts and Illinois, permit the State to appeal waiver decisions but do not allow juveniles to appeal.[107]

Illinois law currently permits the State to file an interlocutory appeal of a juvenile court's decision not to transfer but denies to juveniles the right to interlocutory review of adverse [72] transfer decisions. The consequences of this imbalance of rights are devastating to juveniles. Because of delays in getting transcripts completed coupled with delays in the appellate process, minors often

106 43 Ill. 2d at 148., 251 N.E.2d at 530

107 See Hairfield & Com, 376 S.E.2d 796, 799 n.2 (Va. Ct. App. 1989). It is also no longer true that "because the matter depends so largely upon the varying provisions of the applicable statutes, nothing is to be gained by a detailed analysis of the authorities from other jurisdictions." Jiles, 43 Ill. 2d at 148, 251 N.E.2d at 530. Illinois, like most states, has modeled its transfer on the criteria for transfer decisions outlined in the Supreme Court's decision in Kent v. United States, 366 U.S. 541, 566-567 (1966).

must wait up to two years for the State's interlocutory appeal to be decided. For most minors, this means prolonged periods of pretrial detention, during which time they are deprived of the full range of rehabilitative services offered by the Juvenile Court. The current state of the law also encourages abuses of prosecutorial discretion in the filing of interlocutory appeals, provides the State with leverage in plea bargaining, and allows the State substantial control over the development of the law as it relates to transfer. ***The Illinois Supreme Court should promulgate a rule and procedures for the expedited interlocutory appeals of transfer decisions by both the State and the juvenile.***